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IN THE  
**Supreme Court of the United States**

October Term, 1951

No. **543**

ON LEE,

—against—

*Petitioner,*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION AND BRIEF FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

HENRY K. CHAPMAN  
GILBERT S. ROSENTHAL  
*Attorneys for Petitioner*



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FOR THE SECOND CIRCUIT**

*To the Honorable the Chief Justice of the United States  
and the Honorable Associate Justices of the Supreme  
Court of the United States:*

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 21st, 1951, affirming a judgment of conviction in this criminal cause.

**Opinions Below**

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the Second Circuit was by a divided court. Swan, *Ch. J.*, wrote the prevailing opinion in which Clark, *C.J.* concurred. Frank, *C.J.*, wrote the dissenting opinion. These opinions

have not as yet been reported, but are printed at the end of the within petition and a copy of same is also set forth at the end of the certified copy of the record submitted herewith.

### **Jurisdiction**

The jurisdiction of this Court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, §1254, United States Code.

### **Questions Presented**

In the instant case, under a two count indictment<sup>1</sup> charging that the petitioner and a co-defendant, who pleaded guilty in the court below, unlawfully received, concealed and sold approximately one pound of opium on January 22nd, 1950, after the same had been imported and brought into the United States contrary to law<sup>2</sup> and that petitioner and his co-defendant together with others unknown to the Grand Jury unlawfully, wilfully and knowingly conspired to violate various statutes of the United States concerning traffic in narcotics<sup>3</sup> (R. pp. II-V) was it not prejudicial error to admit evidence of conversations allegedly held some six weeks after petitioner's arrest, between petitioner and a special employee of the Government, one Chin Poy, the conversations taking place in petitioner's combined home and place of business at Hoboken, New Jersey, Chin Poy having entered the premises by stealth and subterfuge and carrying concealed upon his person

<sup>1</sup> Indictment is set forth at pp. II-V of Record.

<sup>2</sup> In violation of §§173 and 174, of Title 21, U. S. C.

<sup>3</sup> In violation of §371 of Title 18, U. S. C., conspiring to violate §§2553(a) and 2554 of Title 26, U. S. C.

a microphone and a miniature radio transmitter thus causing the conversations to be radioed to the world outside of petitioner's home and place of business where it could be picked up by a radio receiving set operated by a United States Treasury Department Narcotic Agent upon the same wave length as the transmitter (R. pp. 163-4), said agent being the only one who testified in respect to the alleged conversations, Chin Poy, the special employee who allegedly held the conversation with petitioner not being produced by the government in the Court below and no excuse or explanation being offered for his absence (R. p. 178), the Narcotic Agent's testimony being based upon alleged refreshing of his memory by the use of secondary evidence consisting of notes claimed to have been prepared by the absent special employee, Chin Poy, some time subsequent to the event (R. pp. 147-50). Should not this evidence have been excluded, having been obtained:

- (a) In violation of petitioner's Constitutional Rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States?
- (b) In violation of the provisions of Section 695 of Title 47 of the United States Code, the Federal Communications Act?

Should not this evidence also be ruled inadmissible by reason of the inherent power of this Court to formulate rules of evidence for Federal Criminal Trials, guided by the consideration of justice?

Objection to the admission of the said evidence was duly taken (R. p. 104).

Another question presented in the instant case is: was it not prejudicial error to admit evidence of accusatory

and incriminating admissions alleged to have been made by a co-defendant subsequent to arrest and in the presence of the petitioner, to which petitioner made no reply, said evidence being received by the trial judge on the theory that since the petitioner had not denied the statement he had, by his silence, admitted what was not denied (R. pp. 73-80, 102-3, 136, 137-9, 217, 219-222), particularly where it affirmatively appears in the Record in the instant case that subsequent to arrest and prior to the making of the alleged accusatory statement by the co-defendant, the petitioner had denied any connection between himself and the opium sold and delivered by the co-defendant to the federal narcotic agent? (R. pp. 53, 63). Objection to the admission of this evidence was taken timely (R. pp. 73, 4).

Was this error corrected by the erroneous charge of the trial court? (R. pp. 360-1).

Would the charge of the trial court, even if correct—which it was not in the instant case—correct and cure the harm done by the erroneous admission of this evidence coupled with long colloquy and discussion in and out of the presence of the trial jury?

### Statutes Involved

Section 173, Title 21, United States Code:

“173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to

be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe \* \* \*."

**Section 174, Title 21, United States Code:**

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

"174. Same; penalty; evidence.—If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, \* \* \* contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years \* \* \*."

**Title 26, Section 2553(a), United States Code:**

"§2553. Packages—(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a), except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; \* \* \*."

Title 26, Section 2554(a), United States Code:

“§2554. Order forms—(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.”

Title 18, Section 371, United States Code:

“§371 Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

**Reasons for Allowing Writ**

The issues presented by the questions propounded *supra* have never been passed upon directly by this Honorable Court. This is the first known case presenting the question of the right of the Government to invade one's home and place of business using a radio device commonly known as a “walkie-talkie” radio set. The case presents the use of technical instruments unknown to man at the time of the decision by this Honorable Court in *Olmstead v. United States*, 277 U. S. 438. An extremely interesting, novel and important issue is raised for the first time as to whether

or not the use by Government employees of the shortwave radio set, introduced into a defendant's home by stealth and subterfuge, does not violate a defendant's constitutional guarantees granted him under the Fourth and Fifth Amendments of the Constitution, nor has there ever been any ruling by this Court on the issue of whether or not such use of a radio instrument is or is not in violation of the prohibitions contained within §605 of Title 47 U. S. C., the Federal Communications Act. In fact, so far as is known this is the first time either issue has ever been passed upon by any of the United States Courts of Appeal.

This case also presents another issue which has never been directly passed upon or considered by this Court since 1895. The admissibility of and the weight to be given a failure by a defendant after arrest to deny or affirm the accusatory statement made in his presence by a co-defendant after arrest. The last known case in which the issue was at all discussed by this Honorable Court was *Sparf & Hanson v. United States*, 156 U. S. 51, and even there the issue was not as clearly and squarely presented as it is in the instant case. The decisions of the various circuits are in conflict with each other.

It is also of great importance that a decision be given by this Honorable Court on the question of whether or not a Judge can be held to have cured an admittedly erroneous ruling during the trial on the question of admissibility of evidence particularly where lengthy and complete discussion and colloquy was had throughout the trial in the presence and hearing of the jury on the legal proposition presented and further particularly where the effort to correct by the Judge of the trial Court assumed a state of facts which were not in evidence.

The issues set forth above present, to say the least, extremely important questions of constitutional and federal

law; important to the general public and the Bench and the Bar. Until these questions have been passed and ruled upon by this Honorable Court no trial Court or Court of Appeals can feel reasonably certain and secure that the rulings made by it upon the issues presented are truly the law of the land.

### Statement

Benny Gim, a former agent of the Bureau of Narcotics, attached to the office in New York City, stated that he was introduced to the co-defendant, Gong Len Ying, on January 22nd, 1950, and that upon the first introduction he conversed with him concerning the purchase of opium (R. p. 4). After extended conversation and bickering concerning price, a deal was arranged. He met Gong at the appointed place and time, paid to him \$550.00 whereupon Gong left him and returned shortly thereafter with a package containing a pound of crude opium (R. p. 7). Subsequently he met Gong on February 2nd and had a conversation concerning his possible purchase of twenty pounds of opium and again met him at 10:30 on the same evening. He next saw Gong February 9th, 1950, and Gong stated that he could have the opium for him on February 12th and they made an appointment. He met Gong as agreed and was to return at 1:30. A price was agreed of \$500.00 per pound. On the second meeting on that day Gong insisted on receiving the cash before delivery of the opium and an argument ensued between them as to which should be given up first, the money or the opium. Gong left him on three occasions, went across the street and on each occasion returned in five or ten minutes and remained adamant in his demands for the cash before delivery and

after the third such trip Agent GIM gave a previously arranged signal for Gong's arrest (R. p. 18).

Upon cross-examination he testified that on his very first meeting with Gong he had dickered with him concerning the price and Gong made the price and promised delivery without consultation with anyone else. That although a sale had taken place and Gong had received marked money, no effort was made to arrest Gong on January 22nd (R. pp. 31-34).

That he never saw the petitioner with Gong and that the first time he saw petitioner was when he was brought into Police Headquarters on February 12th at about 3 o'clock in the afternoon (R. pp. 51-2). He further testified that petitioner was questioned in his presence concerning the pound of opium that Gong had sold January 22nd, 1950 and petitioner denied ever having given or sold it to Gong (R. p. 53) or having any dealings with opium (R. p. 63).

Ellsworth Monahan, a detective of the Police Department of the City of New York assigned to the Narcotic Squad, was called by the Government. He stated that he had seen Agent Gim and Gong together on January 22nd, 1950 (R. p. 64) and later saw petitioner and Gong come out of 15 Mott Street and go to 79 Mott Street together, and that after about twenty minutes Gong left and kept his appointment with Gim and petitioner left and walked in a different direction. Upon questioning by the Court he stated that he never saw petitioner have or handle a package (R. p. 68). He also testified corroborating Agent Gim's version of the various meetings with Gong, and that upon a signal from Agent Gim he and other police officers and narcotic agents arrested both Gong and petitioner (R. pp.

72-3). That he questioned them and the Federal Agents questioned them in Chinese and petitioner denied having any transactions with Gong (R. p. 73). That when they eventually got to the office of the Federal Narcotic Bureau, he for the first time questioned Gong in the presence and hearing of petitioner and asked him where he had obtained the opium that he sold to Agent Gim on January 22nd. Over the objection and exception of counsel the Court elicited the conversation alleged to have been had with the co-defendant Gong by Officer Monahan subsequent to arrest and after he had received a denial of any connection in the transaction by petitioner. He was permitted to testify that Gong stated that he had received the opium from the petitioner in the hallway of 79 Mott Street on January 22nd and that petitioner said nothing in response to this statement by the co-defendant (R. pp. 73-75). Counsel for petitioner immediately asked the Trial Court for a direction to the jury to disregard this conversation and a lengthy colloquy took place between the Court and counsel for petitioner in the presence and hearing of the jury, the Court going so far as to state during this colloquy:

"Now I will say is it a principle of Law that if a man hears some accusation made against him and he doesn't reply, is that evidence against him? \* \* \*

The Court: I understand from the witness—correct me if I don't state the testimony properly—the defendant was first asked and he said he never sold any opium or had anything to do with it. Then in his presence the other man says he got it from him. Is the fact that he didn't reply evidence against him?

Mr. Rosenthal: No, your Honor.

The Court: I think it may well be. I am not speaking about conspiracy" (R. p. 76).

The District Attorney also injected himself into this discussion and in the presence and hearing of the jury offered the following proposition of law:

"Mr. Martin: It is a matter for the jury to consider.

The Court: What is that?

Mr. Martin: I submit it is a matter for the jury to consider why he did not contradict" (R. p. 77).

The entire discussion on this question of evidence when it was first raised during the trial appears at pages 73 to 80 of the Record. This subject matter will be discussed at greater length in petitioner's Brief herein, at which time there will be set forth the various times and places where the discussion arose during the trial.

Upon cross-examination Detective Monahan stated that after the arrest petitioner was searched. He had a normal amount of money upon him and that his money was compared with the serial numbers of the money alleged to have been used on January 22nd and not found to coincide with same (R. p. 88). He also testified that the appellant was questioned extensively by him in English and by the Agents in Chinese and English and that he always denied having any dealings with the co-defendant Gong in respect to the pound of opium alleged to have been sold on January 22nd (R. p. 90).

Lawrence J. Lee, a Narcotic Agent, like both of the preceding witnesses stated that petitioner at all times denied any part in the transaction of January 22nd had between Agent Gim and the co-defendant Gong (R. pp. 102-3).

Over the objection of counsel Agent Lee was permitted to testify to several conversations which he received on a

radio, carried by him, and which were broadcast on March 30th and subsequent dates, the exact dates not being clear in the Record, by one Chin Poy, a Government informer, and petitioner. The substance of these broadcasts was Chin Poy attempted to obtain an admission from petitioner concerning the transactions had between Gong and Gim, and that the petitioner had broadcast by radio that the opium in question did not belong to him, it belonged to a syndicate of which he was merely the representative (R. pp. 104-5). He was also permitted to testify that the appellant was supposed to have told the informer Chin Poy in the broadcast that he was the representative of a syndicate.

Upon cross-examination Agent Lee testified that he never made any notes at the time he claimed to have been receiving the various broadcasts, that he was testifying purely from memory refreshed by alleged writings of Chin Poy, nor was any recording device used. That he did attempt to use a recording device of Chin Poy's conversation but the device was not working (R. pp. 109-10, 196-7).

He stated that he knew the petitioner to be a member of the "Eng" family and that this group had its headquarters at 15 Mott Street (R. p. 154). Further cross-examination developed that Agent Lee and a city detective had gone with petitioner to 79 Mott Street where they tried the keys, found upon the petitioner, on the various doors of the apartments at that address, but that none of them fit (R. p. 169). The witness stated Chin Poy, the informer, was not in court and had not been during the trial, and no explanation was given for his absence from court (R. pp. 175-8). He testified to the effect that while he was in Hoboken allegedly receiving broadcasts of the conversation between Chin Poy and petitioner on two occasions, he

stood in the vestibule of an apartment house on the same block, with the radio attached to his car and the set in a briefcase. The witness stated that on February 13th he went to the two places of business conducted by petitioner in Hoboken and searched the premises plus a safe in one of them, and found no evidence of any narcotics, nor was any of the money found therein part of the marked money given to Gong on January 29th (R. pp. 192-4).

The co-defendant, Gong Len Ying, testified in behalf of the Government with Narcotic Agent Lee acting as interpreter. He said he was in the delivery business and that he knew petitioner for about two years (R. p. 200). That he had pleaded guilty to the Indictment herein (R. p. 203) and that the pound of opium he had sold to Agent Gim on January 22nd, 1950, had been obtained by him from On Lee, at 79 Mott Street (R. p. 204). That he was not certain of the amount received by him for the opium and had given all that he had received, except \$70.00, to the petitioner, keeping \$70.00 for his share of the transaction (R. pp. 204-5). When he met Gim on February 12th, Gim told him he wanted to buy twenty pounds of opium and Gong informed Gim he would try and get it. That he called up petitioner who stated he did not know whether he had any opium, but that he would see and that he asked petitioner to come to Chinatown (R. pp. 213-15). That he met petitioner at 15 Mott Street and went in and had tea with him and that when he asked petitioner about getting twenty pounds of opium petitioner stated that if there was any money they would talk. He claimed he repeated this to Agent Gim. He said he went back and forth between Agent Gim and the petitioner three times, he received no money or opium and he and petitioner were placed under arrest (R. p. 218). Again over the objection and exception of counsel, the

District Attorney attempted to elicit the fact that the co-defendant, Gong, had made an admission of guilt implicating the appellant in the presence and hearing of the petitioner without any denial on the part of the petitioner (R. pp. 217-21). He also testified under cross-examination that he had definitely told Agent Gim that if he received money from him he could definitely deliver twenty pounds of opium (R. p. 235).

Arthur Compton was called as a character witness for the petitioner. He testified he resided at 1225 Washington Street, Hoboken, New Jersey, and was retired, having been assistant manager of the D. L. & W. Railroad, marine division. That petitioner's laundry is right across the street from him and that he had known him for five or six years and that his reputation was excellent. Cross-examination developed that he had discussed his reputation with many people including the petitioner's landlord and that everyone spoke well of the petitioner (R. pp. 234-41).

Eng See (it was called as a character witness for the petitioner. He stated he had known petitioner for about fifteen years and knew a lot of Chinese people who knew him and that the appellant had an excellent reputation and good character (R. pp. 242-43).

Elsie Lee, wife of the petitioner, called as a witness in his behalf stated they were married June 12th, 1917, in San Francisco. Their Marriage License was introduced into evidence as Defendant's Exhibit "C" (R. p. 259), that they had lived in Hoboken for about twenty years and that they had one son 22 years of age. That they owned two laundries in Hoboken she operating the one at 105 Tenth Street and her husband operating the one at 1222 Washington Street, and that their usual hours of work

were from nine in the morning till about twelve at night (R. p. 260). That she knew the co-defendant Gong and for about three years he had sold Chinese food and vegetables to her and her husband. That she had discontinued dealing with him in September 1949 because he tried to make advances to her, invited her to shows, beaches, etc., and showed her large sums of money and told her he would like to marry her. She never told her husband anything concerning this as she was afraid it would start a fight (R. p. 262).

On Lee, the petitioner, took the stand in his own behalf. He stated he was born in the United States with the name of Chu Chee under which name he was both married and registered under the draft, his draft registration being introduced into evidence as Defendant's Exhibit "D". He stated he used the name On Lee for business purposes (R. p. 266). That he worked about fifteen hours a day in his laundry. That he was 61 or 62 years of age and had never previously been arrested or convicted of any crime. That he knew the co-defendant Gong and had bought food and supplies from him (R. p. 267). That some time in January Gong had told him he knew of a wet wash laundry for sale in Newark and would arrange an appointment for him to meet the owner on the following Sunday in Chinatown and that is when he saw Gong on January 22nd, 1950. That he met him at 15 Mott Street, the rooms of his family association, and had gone with him to 79 Mott Street, at Gong's request, to an apartment in that building, what floor he did not recall (R. pp. 268-9). That there were some men playing mahjong and that Gong left him for a while and went into some other room looking for the wetwash owner. That the petitioner kibitzed the mahjong game and Gong left before he did (R. p. 271). That he never gave

or sold to Gong a pound of opium or any opium. He stated he had one time written his telephone number so that Gong could call him when he met the wetwash owner in New York and that his telephone had an extension in both laundries in Hoboken so that if anybody spoke to him while he was in Washington Street anyone else could have listened in on the conversation at Tenth Street (R. pp. 271-2). He denied ever having dealt in opium in any form and the Court asked him had he ever smoked it to which he replied:

"Never! I hate it" (R. p. 272).

He received a phone call on the day of his arrest, February 12th, 1950, from Gong, who told him that if he came over to New York right away he would be able to meet the owner of the wetwash which was for sale. That he met Gong two or three times in about ten minute intervals, but Gong never returned with the wetwash owner. That when they left the premises Gong informed him he would try once more to find the man and while petitioner was waiting for him on the sidewalk, he was arrested. He denied ever having discussed with Gong the purchase or sale of ten or twenty pounds of opium or any opium (R. p. 274). That he was questioned by City detectives and the Agents concerning opium and he informed them that he had none, that the officers accused him of selling opium with Gong and he denied it (R. p. 276).

He admitted knowing Chin Poy for about 16 years and that Chin Poy came to see him after his arrest. The Court, over the objection of the attorney for the petitioner, permitted the District Attorney to read various questions and answers to the appellant concerning the conversation allegedly had with Chin Poy, and broadcast by radio, which

questions and answers he denied. The District Attorney was also permitted to ask questions concerning an alleged proposed future criminal transaction with Chin Poy (R. pp. 292-99).

## POINT I

The receipt of the testimony of Agent Lee concerning conversations between Chin Poy and petitioner allegedly overheard by means of the use of a radio transmitter operated by Chin Poy and a radio receiver operated by Agent Lee was error prejudicial to the petitioner.

Over the objection of counsel, federal narcotic agent Lee was permitted to testify to the receipt by radio of radio broadcasts of conversations alleged to have been had between Chin Poy, a special Government employee, and the petitioner (R. p. 104). This testimony was objectionable and highly prejudicial to the petitioner and should have been excluded for three reasons which are discussed at length hereinafter:

This issue and question has never been previously ruled upon by the Supreme Court and the importance of the question involved is shown by the opening paragraph of the dissenting opinion of Frank, *C.J.*<sup>4</sup>

<sup>4</sup> "1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles. Today On Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy." Case referred to: *Yick Wo v. Hopkins* (118 U. S. 356). (R. p. 414)

- (a) **The evidence of the alleged conversations between Chin Poy, Government Special Employee, and the petitioner, allegedly overheard by operation of shortwave radio was inadmissible having been obtained in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States and in violation of his right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.**

This question has been explored at great length in the dissenting opinion of Frank, C.J., in the instant case (R. pp. 414-28). The issue has been discussed so fully and lucidly by Judge Frank that it is with extreme difficulty at this time that petitioner's counsel restrains himself from offering the said dissenting opinion as petitioner's Brief herein and attempts to enlarge upon same. In the instant case it appears that Chin Poy, a stool pigeon, described in the Record by narcotic agent Lee with the euphemism, "special employee" of the Government, went to the combination home and place of business of the petitioner in Hoboken, New Jersey, this being a chinese hand laundry with the store portion in the front of the premises and living quarters in the back rooms of the said premises, and engaged petitioner in conversation. Chin Poy was carrying, according to the testimony of Agent Lee, concealed upon his person, a microphone and radio transmitting equipment (R. pp. 103-4). Narcotic Agent Lee stationed himself in the vestibule of a building about four doors removed from the petitioner's premises and by means of a radio receiving set working on the same wave length as the transmitter concealed upon the person of Chin Poy, heard, according to his testimony, the conversation alleged to have been had between Chin Poy and the petitioner. Agent Lee testified that his receiving set was

concealed in a briefcase which he rested upon a radiator in the aforementioned vestibule and that he had in his ear a crystal device which enabled him to hear the broadcast from his aforementioned receiving set.

He was permitted, over the objection of petitioner's trial counsel (R. p. 104) to testify to the conversation he claimed to have heard between Chin Poy and the petitioner on March 30, 1950, approximately six weeks after petitioner's arrest on February 12th, 1950. His testimony was based upon alleged refreshing of his recollection by notes claimed to have been made by Chin Poy (R. pp. 110-12, 117-18, 120). At one point Agent Lee stated he had lost his own original notes (R. pp. 118, 120-1) and at another point that he had misplaced them (R. pp. 186-7). No excuse or explanation was offered for the failure of the Government to produce Chin Poy at the trial (R. pp. 175-8). Agent Lee testified he attempted to use a recording device to record the conversation between the petitioner and Chin Poy, but the device was not in working order (R. pp. 109-10, 196-7). Petitioner testified that he had known Chin Poy for a number of years, he having been a former employee of petitioner, and that when Chin Poy called at his premises on or about March 30th, he had ordered him therefrom. He denied having any conversation with the said Chin Poy in respect to the facts of the instant case (R. p. 300).

It is the contention of the petitioner herein and it is respectfully submitted in his behalf, that the entry of the Government special employee upon the combined residence and business premises of the petitioner was a trespass and constituted an unreasonable and illegal search and seizure in violation of the guarantees contained within the Fourth Amendment, and the evidence thus obtained was inad-

missible in view of the guarantees contained within the Fifth Amendment.

The prevailing opinion of Swan, *Ch. J.*, in the Court of Appeals below, went upon the theory that this evidence was admissible being similar to that obtained by a federal employee entering the premises of a defendant by subterfuge only and thereafter being permitted to testify concerning statements overheard or that are made to him while upon the premises (R. p. 410). There might be merit to this position and theory if the Government had produced the party who had entered petitioner's premises by subterfuge, namely, the Government employee Chin Poy, although even under such circumstances it is the petitioner's contention such evidence would not be admissible.

Be that as it may, the fact is that we are not here concerned with the testimony of Chin Poy, he never having been produced in Court nor any explanation given for his absence. The issue clearly presents itself as to whether or not the evidence allegedly obtained by the combination of a Government employee by fraud and by subterfuge entering petitioner's home and place of business and by the use of a radio transmitter and receiving set so that the evidence, if any, obtained by this special employee would be broadcast from the premises to the world and more particularly to another Government employee, federal narcotic agent Lee, should have been admitted into evidence and is a proper means of gathering evidence by federal employees. In the case of *Gouled v. United States*, 255 U. S. 298,<sup>5</sup> this Court had occasion to specifically rule

<sup>5</sup> In that case a federal employee entered the office of a friend, who was suspected of crime, and while there under the pretense of paying a friendly visit surreptitiously extracted and removed certain papers from the defendant's desk.

and pass upon the question of the admission into evidence, of evidence obtained surreptitiously and by fraud on the part of a Government witness and in that case it was distinctly held that such evidence was obtained by means of an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the papers was a violation of the Fifth Amendment.

The prevailing opinion in the appellate Court below makes much of the fact that the majority opinion of *Olmstead v. United States*, 277 U. S. 438, has never been directly questioned or overruled by this Court. It does, however, admit that in *Goldman v. United States*, 316 U. S. 129, 134, this Court, by dicta, indicated that if the dictaphone which had been placed in the office of one of the defendants by trespass had worked and had been the means of gathering the evidence offered by the Government, such evidence would have been inadmissible.

Where can you find a more clear cut instance of evidence being obtained by trespass than in the instant case? Here we have Chin Poy, with a radio transmitter concealed upon his person in the premises of the petitioner. In the *Goldman* case we had a dictaphone physically placed upon the premises. In both cases we had a direct crossing of the threshold of the defendant by Government employees armed with instruments that would cause and permit other Government employees to, for all practical purposes, to accomplish the same as if they had secreted themselves physically upon the premises of the defendant.

Even if this Court were to hold at present that there was no disposition on their part to overrule the decision in *Olmstead v. United States*, cited *supra*, the distinction between the instant case and the *Olmstead* case is so marked that a ruling might well be made here in favor of peti-

tioner without destroying the effect of or specifically overruling the Olmstead decision.

Chief Justice Taft in his opinion took occasion at five specific instances to point out there had been no intrusion, invasion, or trespass upon the physical premises of the defendant. He took pains to set this forth at page 457 of his opinion,<sup>6</sup> at the top of 464<sup>7</sup> of his opinion in discussing *Gould v. United States* (cited *supra*), at the bottom of page 464,<sup>8</sup> and twice on page 466.<sup>9</sup>

The Courts of this country and particularly this Honorable Court, have repeatedly found it necessary to curtail the activities of law enforcement agencies and particularly the means and methods used to gather evidence. In fact, in *United States v. Trupiano*, 334 U. S. 369, a case cited and approved in the majority opinion in the Court of Appeals below, this Court took great pains to point out that it was still necessary for the Courts to lay down and enforce the rules concerning the gathering of evidence.<sup>10</sup>

<sup>6</sup> "The insertions were made without trespass upon any property of the defendants \* \* \* the taps from house lines were made in the streets near the houses".

<sup>7</sup> "There was actual entrance into the private quarters of defendant". Referring to *Gould v. United States*.

<sup>8</sup> "There was no entry of the houses or offices of the defendants".

<sup>9</sup> "Here those who intercepted the projected voices were not in the house of either party to the conversation"

"\* \* \* or an actual physical invasion of his house, or 'curtilage' for the purpose of making a seizure."

<sup>10</sup> This Court said at 705:

"In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed".

Petitioner submits that in his case it is highly significant that the evidence complained of was not obtained under the circum-

The decisions of this Court and the Court below are replete with the fact that no distinction is to be made between search and seizure of a home or of a man's place of business.<sup>11</sup>

Chief Justice Swan's opinion below makes much of the fact that there was nothing tangible seized or obtained in the instant case and urges that the Fourth Amendment of the Constitution intended solely to provide for the search of a place or the person and the seizure of tangible things. This argument is particularly disturbing and unappealing to a practicing lawyer or doctor since all people engaged in the professions have, at some time or other, and unfortunately all too often, "had their brains picked", by a perfectly respectable friend or acquaintance. This friend or acquaintance would never give thought, secretly or publicly, to picking the pocket of anyone or stealing the wares of a merchant, but often has not hesitated to steal and take the stock in trade of his professional friend or acquaintance by seeking and obtaining advice with no intent to pay for same. Who can say that the ideas of a

stances outlined in the *Trupiano*, there being no "excitement of the capture" of a suspected person. The petitioner complains of acts of the Government's agents taking place over 6 weeks after the arrest of the petitioner and being committed with deliberation and in apparent desire to bolster what must have appeared to even the most biased federal employee to be, to say the least, an extremely weak and unsustainable case against the petitioner. Continuing, this Court said in the *Trupiano* case:

"To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

<sup>11</sup> *Silverthorne Lumber Co. v. United States*, 251 U. S. 385;  
*Gouled v. United States*, cited *supra*;  
*Go Bart Co. v. United States*, 282 U. S. 344;  
*United States v. Lefkowitz*, 285 U. S. 452.

man or his words and every thought are not his secret property the same as his watch, pocketbook or papers. If we were to carry this to its logical conclusion it can be conceived that a Government agent under the circumstances and conditions existing in the instant case, might carry on a conversation with a mute who could not answer but would write out his replies and then we would have federal narcotic Agent Lee testifying to what he heard over the radio, namely the question or statements propounded by Chin Poy and producing and introducing into evidence the written replies made and given to Chin Poy by the mute. Can one say that under such circumstances that it would be permissible for Agent Lee to testify as to the oral statements made by Chin Poy, but that the written replies would be inadmissible into evidence because it was obtained by illegal search and seizure and something tangible or physical had been carried away as a result of that illegal search and seizure. Suppose one called at the office of a friend who had in his house a wire recording or dictaphone recording device, and that this device was secretly placed in operation by the caller while a conversation was being held between the two and that the caller then surreptitiously purloined the reel of wire or the record cut by the dictaphone. Would this evidence be inadmissible because the physical evidence of the spoken word had been obtained in violation of the Fourth Amendment or should it not be rejected from evidence because the very spoken word itself had been obtained in violation of the Fourth Amendment.

The prevailing opinion below cites with approval the case of *Davis v. United States*, 378 U. S. 582 as authority for the admissibility of evidence if obtained by subterfuge. A careful reading of this decision discloses that there was

no subterfuge on the part of the Government agents and the evidence obtained was due to the invitation of the defendant to any and all persons including the general public to join with him in breaking the Law of the United States. The case of *United States v. Trupiano* (cited *supra*), is also cited in the prevailing opinion for authority that subterfuge is not a trespass. The distinctions between these cases and the instant case are so clearly set forth in the dissenting opinion of Frank, *C.J.* (R. p. 425), that to belabor them further in this Brief would serve no purpose.

This Court only recently condemned surreptitious entry into a premises. In *United States v. Jesse Jeffers Jr.*, decided November 13th, 1951 (no official citation as yet) the prevailing opinion of the Court said in discussing the entry by officers to make a search for the sole purpose of seizing contraband:

" \* \* \* the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted *surreptitiously* and by means denounced as criminal." (Emphasis supplied)<sup>12</sup>

<sup>12</sup> A very interesting theory is presented by footnote 7 of the dissenting opinion of Murphy *J.* in *Goldman v. United States*, 316 U. S. 129 at 140:

"A warrant can be devised which would permit the use of a detectaphone, cf. Article 1 §12 of the New York Constitution (1938). And while a search warrant with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies (see *Agnello v. United States*, 269 U. S. 20, 32) some method of responsible supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusion by Government officers. (See Wigmore, Evidence, 3rd Ed. Vol. 8, §2184b, pp. 51-2.)

If the ruling in the instant case is permitted to stand no one will be safe in talking to a friend, acquaintance or business associate, no matter where such conversation might take place and particularly if it takes place within his home or place of business, unless and until he has conducted a thorough and complete investigation and search of the person of the party with whom he is conducting the conversation, or in police parlance, he has "frisked" the individual. If because of modern science we are to live under the constant threat of having our words and very thoughts broadcast to the world or to individuals we do not even know, then our theory of the inherent right of every member of our society in these United States to liberty becomes a mockery and travesty and mere cant. Several years ago, the exact title of the case involved escaping the writer, but the name of the attorney involved being well known to the writer and members of the Bar of the City and State of New York and even the United States, a well known and eminently respectable member of the Bar of the City and State of New York went to California on a combined honeymoon and business trip. The business concerned negotiations of a possible settlement of a dispute involving large sums of money and concerned with an oil company. Agents of the opposition sank so low as to secrete in the honeymoon boudoir, immediately beneath the bed of this attorney and his wife, a dictaphone connected to a recording device placed elsewhere so that not only did they record and obtain any and all business conversations held within the bedroom, but also the intimate details of the honeymoon of this man and wife. If memory serves me correctly prosecution was had and conviction obtained of the parties committing this foul and low form of spying.

Judicial approval of the conduct of the federal employees in the instant case can only produce repeated and worse offenses of this nature.

The dissenting opinion of Frank, C.J., quotes at length from Orwell's "1984" and also cites references at length to the conditions existing within Nazi Germany when and where society had what is tantamount to thought control. The actions of the Government agents and employees in this case is what we hear as now occurring in those Countries beyond the "Iron Curtain" and certainly do not conform to the concepts within this Country of those

"certain inalienable rights, that among these are life, liberty and the pursuit of happiness",

with which the second paragraph of our Declaration of Independence informs the world all men are endowed.

In *Neuslein v. District of Columbia*, 115 Fed. (2d) 699, Chief Justice Vinson, then a Circuit Judge, writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while upon the said premises obtained certain evidence through their power of observation and hearing while questioning the defendant, they had, in his opinion, conducted an illegal search and seizure. He said in part,

"The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating. \* \* \* The Fourth and Fifth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by

unlawfully coming into his home and by placing him in custody. \* \* \* But how did the officers and themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right."

The prevailing opinion in the Court of Appeals attempts to distinguish the instant case from the *Neuslein* case because of the fact that here the entry was through subterfuge and there it was a direct trespass. In view of the decision in the *Gouled v. United States* and *United States v. Jesse Jeffers Jr.*, both cited *supra*, it is respectfully submitted that there is no distinction between entrance made through trespass or by fraud and subterfuge and that in either or both cases a trespass in violation of the Fourth Amendment is committed.

(b) The evidence of the conversations between Chin Poy and petitioner having been obtained by means and use of radio were obtained in violation of §605, Title 47 U. S. C. and, therefore, inadmissible.

Prior to the decision in *Olmstead v. United States*, there was upon the Statute books a Law commonly known as "The Radio Act".<sup>13</sup> Subsequent to the decision in *Olmstead*

<sup>13</sup> Chapter 169, §27, Laws of 1927:

No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent or attorney or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination or to proper accounting or distributing offices of the various communication centers over which the radio communication may be passed, or to a master of a ship under whom he is serving, or in response to a Subpoena issued by a Court of competent jurisdiction, or on demand of

v. *United States* and its ruling that the tapping of telephone wires and obtaining the conversations was legal and the evidence thus obtained admissible and not in violation of the Fourth Amendment, Congress passed what is known as the Federal Communications Act and by §605 of Title 47 U. S. C. made the interception or disclosure of messages transmitted by radio, telephone, or telegraph, illegal.<sup>14</sup>

other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person's and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof and knowing that such information was so obtained shall divulge or publish the contents, substance, purport, effect, or meaning thereof, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; provided that this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

14 §605. Unauthorized publication or use of communications:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted

The Federal Communications Act closely parallels and incorporates most of the provisions of the former Radio Act. The prevailing opinion of the Court below dismissed as not sustainable the contention that the disclosure of the evidence overheard by means of radio by Agent Lee was forbidden by the Federal Communications Act. It quoted from the decision of this Court in *Goldman v. United States*, cited *supra*<sup>15</sup> and the Court found that there was no "interception" of a communication, the radio being used merely as a mechanical means of eavesdropping. By the very nature of radio you have a different condition presented in respect to interception than exists in telephone or telegraph wires. There cannot be and there is not in an interception of a radio broadcast by the introduction of any mechanical device between the point of transmission and the point of interception. The very use of the transmitted causes the conversation to be broadcast upon the ether waves and anyone with a receiving set tuned to the

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communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, ch. 652, §605, 48 Stat. 1103.)

<sup>15</sup> The protection intended and afforded by the Statute is of the means of communication and not of the secrecy of the conversation (316 U. S. 129, 133).

same wave length as the transmitter will receive the message even though it also is received at some other point by the intended recipient. The Radio Act and the Federal Communications Act both provide that no person shall either receive or use any information contained within a message for his own benefit or for the benefit of another not entitled thereto or having become acquainted with the contents of any message, divulge the same without the consent of the senders. In the instant case the petitioner never wittingly or knowingly broadcasted to Agent Lee so that it cannot be contended that federal narcotic Agent Lee was a proper recipient of any radio message from the petitioner nor did the petitioner at any time consent to the disclosure by Agent Lee of his broadcast and while it is probably properly assumed that Chin Poy did so consent by the very use of the transmitter.<sup>16</sup> There is here, as was pointed out by the Circuit Court of Appeals for the Second Circuit, in the case of *United States v. Polakoff*, 112 Fed. (2d) 888, two senders and, therefore, interception or disclosure of the broadcast without the consent of the petitioner could not be held to be authorized under the exceptions contained within the Federal Communications Act.

- (c) **The inherent power of this Honorable Court to formulate rules of evidence in federal criminal trials guided by consideration of justice should cause the rejection of evidence obtained in the manner and by the devices used in the obtaining of evidence of the conversations had by Chin Poy and the petitioner.**

This Court has ruled in *McNabb v. United States*, 318 U. S. 332 that in the interest of justice this Court can and

<sup>16</sup> The Record is barren of any statement as to his consent.

should reject evidence improperly obtained by Federal officers, the Court stated at 341:

"The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal Courts, see *Nardone v. United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions \* \* \* and in formulating such rules of evidence for federal criminal trials *the Court has been guided by consideration of justice not limited to the strict canons of evidentiary relevance.*" <sup>17</sup>

If this Honorable Court is of the opinion that the evidence in question was not obtained in violation of the petitioner's constitutional rights or in violation of the provisions of §605 of Title 47 U. S. C., could there be a more proper place for this Court to state and exercise what it has classified as its inherent right to formulate rules of criminal evidence and to direct the rejection of the evidence in the instant case and in the future all evidence obtained by the means and method employed by the Government in this case.

<sup>17</sup> Emphasis supplied.

## POINT II

The admission into evidence of the accusatory statement made by co-defendant, Gong Len Ying, subsequent to arrest, was serious error prejudicial to petitioner.

The petitioner respectfully submits that serious and prejudicial error was committed by the Trial Court in permitting to be introduced into evidence, over the objection of the petitioner, statements alleged to have been made by the co-defendant Gong in the presence and hearing of the defendant.

The District Attorney elicited from Government witness Detective Monahan, that he had questioned the petitioner and the co-defendant separately and that at that time the petitioner had denied any connection with the co-defendant or any participation in the sale of opium to or with the co-defendant (R. p. 73). There had been previous testimony in the case by Narcotic Agent Gim that the petitioner was asked whether or not he had given or sold a pound of opium to Gong and that he had said no (R. pp. 53, 63).

Detective Monahan then testified:

"When I got there I put the two of them in one room and I asked the truck driver Gong where he got the opium on January 22nd that he sold to Agent Gim.

The Court: What did he say?" (R. p. 73).

At this point the attorney for the petitioner objected to the question of the Court and the Court replied that it being a statement in the presence and hearing of petitioner it was admissible. The Court proceeded to examine the wit-

ness, Detective Monahan, in detail as appears at pages 74 and 75 of the Record. Counsel then asked for a direction from the Court to the jury to disregard the conversation had with Gong after his arrest, and discussion then took place between the Court and counsel from pages 75 to 80 of the Record. During this discussion in the presence and hearing of the jury the Court expressed the opinion that the failure of a co-defendant on a conspiracy charge to deny the accusatory admission made by another defendant after arrest might be considered by the jury as an admission (R. p. 78). The various statements made by the Court during the discussion in the presence and hearing of the jury could leave the jury with no impression other than that the alleged admission made by Gong in the presence and hearing of the appellant was good and binding evidence against the appellant.

All of this took place on the very first morning of the trial and was constantly referred to and discussed subsequently during the trial, both in and out of the hearing and presence of the jury, by the Court, counsel for the petitioner and the District Attorney.

At page 90 of the Record it appears that Detective Monahan testified that the appellant always denied having any part in the transaction of the sale of the pound of opium in question. Again through Agent Lee, an effort was made to introduce the accusatory statement and admission made by the co-defendant Gong although it appeared affirmatively that the appellant had denied that the opium in question was his (R. p. 102-3).

It becomes apparent how important this point was and how it must have been magnified in the eyes of the trial jury when we realize that at the conclusion of the first

day of the trial and again in the presence and hearing of the jury, the Trial Court, out of a clear sky, when discussing the adjournment for the day, stated:

"The Court: I can give you the citations on admission by acquiescence" (R. p. 136).

On the morning of the second day of the trial at the opening of Court, the attorney for the petitioner proceeded to move to strike from the evidence the testimony which had been given concerning the admission claimed to have been made by Gong after arrest and offered the Court citations and quotations from various Federal cases. Suddenly, the Court decided that no further argument on the subject should be held in the presence of the jury and deferred argument until later in the case (R. p. 137-39).

Although the District Attorney insisted that he had not offered this evidence as proof of an admission on the part of the petitioner he never lost an opportunity during the trial of trying to get same before the trial jury. At page 217 of the Record it appears that he asked the co-defendant, Gong the following question, which he subsequently withdrew when objected to by the petitioner's attorney:

"Q. Did somebody ask you where you obtained the opium that you gave Agent Gim?"

Again at page 219 he pursued the same question in a different form and the Court again engaged in a lengthy colloquy with counsel for petitioner. Pages 219 to 222 of the Record are concerned with the discussion had in the presence of the jury. Counsel for appellant furnished the Court again with the citations which had previously been given on the morning of the second day of the trial. The

remarks of the Court were highly prejudicial to the appellant, some of the worst being as follows:

"The Court: I am not talking about before arrest or after arrest; I am talking about whether a case where a defendant did not open his mouth, whether that could be used against him.

Mr. Rosenthal: They all say he does not have to open his mouth after arrest and that no inference can be drawn from that.

The Court: Some say that and some say to the contrary. \* \* \*

The Court: It would be the natural impulse of a man to contradict" (R. p. 222).

At the conclusion of the people's case the attorney for petitioner again moved in respect to the admission of this evidence and further moved for a withdrawal of a juror and a declaration of a mistrial. It is respectfully submitted that a motion for a mistrial should have, at that time, been granted since it should have been crystal clear to the Trial Court that serious prejudicial error had been committed by it, by the admission of the testimony in question and that nothing that would thereafter be done or said by the Trial Court or anyone else could possibly cure it. This point had been stressed to such an extent during the trial by the remarks referred to above by the Court, that the only result that could reasonably be expected was that the trial jury would believe that the failure of the appellant to deny the accusatory statement of Gong was tantamount to an admission by the petitioner of the truthfulness of that statement.

Apparently the District Attorney knew that serious error had been committed and made no effort to justify the

admission of this evidence by citation of any cases in support of the Court's theory. In fact, when the Judge asked him point blank for any supporting citations he attempted to evade and avoid the issue as appears from the following:

"The Court: You looked it up? You read it? You may read it a different way. What is your best case on it?

Mr. Martin: My position, Judge, is that we don't rely on that part of the testimony.

The Court: I don't care whether you do or not, I am trying the case according to my knowledge of how it should be tried. Why don't you rely on it? Because you think it's wrong? Now, speak up.

Mr. Martin: No, Judge.

The Court: If you introduced it in evidence why was it introduced if it does not amount to anything, what was the idea of it?

Mr. Martin: I did not want to withhold anything from the jury, I merely stated what occurred without asking the jury to draw any inference" (R. p. 254).

It is respectfully submitted that the Court erred in its rulings in respect to the admission and weight of the aforementioned evidence. The following cases all hold that no derogatory inference may be drawn from failure to deny an accusatory statement:

*McCarthy v. U. S.*, decided in the 6th Circuit,  
25 Fed. 2nd 298;

*Yep v. U. S.*, 83 Fed. 2nd 41;

*Skiskowski v. U. S.*, 158 Fed. 2nd 177;

*People v. Rafigilano*, 261 N. Y. 103;

*U. S. v. Lo Biondo*, 135 Fed. 2nd 130 (decided in  
2nd Circuit 4-22-43).

In *McCarthy v. U. S.*, cited and quoted in the *Lo Biondo* case, cited *supra*, the Court said at 299:

"To draw a derogatory inference from mere silence is to compel the defendant to testify and the customary form of warning should be changed and the respondent should be told 'If you say anything, it will be used against you, if you do not say anything, that will be used against you'."

In *Yep v. U. S.*, cited *supra*, the Court at page 43 had this to say in respect to the silence of the defendant when the accusatory statements were made in his presence and hearing:

"At the time of the conversation between Finniss and Esther Haugh, Yep was under arrest.

When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he is charged; and statements tending to implicate him made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him."

The majority opinion of Swan, *Ch.J.*, of the Court of Appeals, held that while the admission into evidence of the accusatory statement made by petitioner's co-defendant after arrest was erroneous (R. p. 164), the error had been cured by the charge of the Court and the petitioner was in no manner prejudiced. Contrast this with the opinion of Swan, *Ch.J.*, then *C.J.*, in *United States v. Corrigan, et al.*, 188 F. (2d) 641, in which case although the Court unanimously concluded that the evidence of the guilt as disclosed in the Record was overwhelming, reversal was

required because of the erroneous admission of two exhibits which reflected on Corrigan's integrity. In his opinion Chief Justice Swan, then Circuit Judge, said at page 645:

"Whether in fact the reports influenced the jury's verdict is, of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

The majority opinion of the Appellate Court below offers also an interesting contrast to that by its former Chief Justice Learned Hand in the case of *Skidmore v. Baltimore & Ohio R. Co.*, 167 Fed. (2nd) 54. In the instant case the prevailing opinion states:

"The jury system is premised on the assumption that when the Judge instructs the jury what evidence it may consider it will obey the instruction" (R. p. 413).

Judge Learned Hand in a lengthy decision discussing generally the effect of the jury system on our jurisprudence said, in *Skidmore v. Baltimore & Ohio R. Co.*, cited *supra*, at page 64:

"The theory of the general verdict involves the assumption that the jury fully comprehends the Judge's instruction concerning the applicable substantive legal rules, yet often the Judge must state those rules to the jury with such niceties that many lawyers do not comprehend them and it is impossible that the jury can."<sup>18</sup>

<sup>18</sup> At page 65, footnote 25d, Judge Hand discusses the fact that appellate Courts are prone to hold so-called "procedural" errors harmless although they all too often probably and undoubtedly influence the verdict of the jury.

As pointed out by Judge Frank in the dissenting opinion below, such error could be considered harmless, if at all, only where the Government had proven an extremely strong case, but that in the instant case the evidence and testimony concerning the guilt of petitioner was, to say the least, weak.

This Court in *Kotteakos v. United States*, 328 U. S. 750, in discussing so called "harmless" error, said at page 764:

"And the question is not, were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or may reasonably be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

And again at page 765 this Court said:

"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The disturbing feature in the instant case is that the majority opinion in the Appellate Court below totally ignores the fact that the Trial Judge in attempting to correct and cure the error complained of unquestionably harmed the petitioner even greater than the original admission of the evidence had done. He misquoted and misstated the evidence and the rule of evidence. In charging on the point in question, which charge was apparently delivered as an afterthought and not as a part of the main charge,

the Trial Judge twice informed the jury that the accusatory statement of the co-defendant was not binding upon the petitioner only if petitioner had denied *before arrest*, the facts contained within the accusatory statement made subsequent to arrest.<sup>19</sup>

Sandwiched in between these incorrect and erroneous statements concerning the facts in the case<sup>20</sup> there is also an equally incorrect charge and statement concerning the Law.<sup>21</sup>

<sup>19</sup> "The Court: \* \* \* I will charge the jury that *if before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest, in the presence of Monahan and possibly some of the other agents was told or heard Gong saying, 'You gave it to me; you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so" (R. pp. 360-1). (Emphasis supplied.)

"\* \* \* Now I modify that by this consideration: *if before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would say that silence did not constitute acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient" (R. pp. 361-2).

<sup>20</sup> There is no proof in the Record of a denial by petitioner prior to arrest. The evidence in the Record discloses without question that there was a denial by petitioner *subsequent* to arrest but prior to the accusatory statement of the co-defendant.

<sup>21</sup> " \* \* \* The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth" (R. p. 362).

The only case cited by the Government in its Brief in the Appellate Court below which would seem to hold contra to *United States v. Lo Biondo*, *Yep v. United States* and the various other cases cited *supra* as authority for the fact that a defendant after arrest is under no compulsion to affirm or deny an accusatory statement made by a co-defendant, and that no inference can be drawn by his failure to do so is the case of *Sparf and Hansen v. United States*, 156 U. S. 51. It is not clear from a reading of the opinion in that case as to whether or not the accusatory statement was made subsequent to actual arrest or during the course of an investigation concerning the circumstances of the commission of the crime charged and leading up to the actual arrest.

### CONCLUSION

It is respectfully submitted that the questions submitted indicate serious errors concerning novel questions and warrants the exercise of this Court's supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully submitted,

HENRY K. CHAPMAN,

GILBERT S. ROSENTHAL

*Attorneys for Petitioner*

## APPENDIX

## Opinion

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 54—October Term, 1951.

(Argued October 3, 1951      Decided November 21, 1951.)

Docket No. 22098

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 UNITED STATES OF AMERICA,
*Appellee,*

—v.—

ON LEE,

*Appellant.*


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 Before:
SWAN, *Chief Judge*, CLARK and FRANK, *Circuit Judges*.Appeal from the United States District Court for the  
Southern District of New York.The appellant was convicted of making an illegal sale of  
opium and of conspiring so to do. Judgment affirmed.GILBERT S. ROSENTHAL, *Attorney for appellant.*MYLES J. LANE, *United States Attorney, for ap-  
pellee*; Stanley D. Robinson and Robert  
Martin, *Assistant United States Attorneys,  
of counsel.*

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SWAN, *Chief Judge*:

This appeal brings up for review a judgment of conviction and sentence under a two count indictment. Count one charged the substantive offense of selling one pound of opium in violation of 21 U. S. C. §§ 173 and 174. Count two charged a conspiracy, 18 U. S. C. § 371, to sell opium in violation of sections 2553(a) and 2554(a) of Title 26 as well as the above mentioned sections of Title 21. The appellant was sentenced to three years' imprisonment on each count, the terms to run concurrently, and to a fine of \$500 on count one. The appeal challenges the sufficiency of the evidence, and asserts errors in the conduct of the trial and in the charge to the jury.

The indictment named two defendants, the appellant and Gong Len Ying. The latter pleaded guilty and testified for the government at the trial of the appellant. He testified that on January 22, 1950 he agreed to deliver to Benny Gim, an undercover agent of the Bureau of Narcotics, one pound of opium for \$550; that Gim gave him the money which he turned over to the appellant, except \$70 retained as his share, and that the appellant then got the opium and delivered it to him and he delivered it to Gim. The appellant took the stand in his own defense and denied having had anything to do with, or any knowledge of, the transaction. He admitted having been with Ying on the evening of January 22nd but said their meeting and conversation related only to the purchase of a laundry to whose owner Ying proposed to introduce him. Which story to believe was plainly for the jury. The appellant argues that even accepting Ying's testimony in full, it proved merely a sale by appellant to Ying (not the crime charged)

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and a sale by Ying on his own account to Gim.<sup>1</sup> But this interpretation of the transaction was foreclosed by the testimony of Agent Lee, if credited by the jury. Agent Lee testified that he heard the appellant admit in conversation with Chin Poy, a government informer, that the opium sold to Gim belonged to a syndicate of which the appellant was a representative and that he had employed Ying to make the sale. Without detailing more of the testimony, we think it obvious that the evidence as to both counts required submission of the case to the jury.

It is urged that error was committed in admitting Agent Lee's testimony concerning the above mentioned conversation between Chin Poy and the appellant. This conversation took place in appellant's laundry several weeks after his arrest and while he was enlarged on bail. Chin Poy carried a concealed radio transmitter and Agent Lee, who was outside the laundry, overheard the conversation by means of a radio receiving device tuned to Chin Poy's transmitter. The testimony was received over the appellant's objection and it is now contended that disclosure of the overheard conversation is forbidden by the Federal Communications Act, 47 U. S. C. A. § 605.<sup>2</sup> The contention is not sustainable. As the Supreme Court said in *Goldman v. United States*, 316 U. S. 129, 133:

"The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."

There was no "interception" of a communication by wire or radio which is what the statute forbids. The radio de-

<sup>1</sup> Cf. *United States v. Koch*, 2 Cir., 113 F. 2d 982.

<sup>2</sup> This section provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish" the contents of such intercepted message.

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vice was merely a mechanical means of eavesdropping, just as the detectaphone was in the *Goldman* case.<sup>3</sup>

As a second string to his bow the appellant contends that even if the use of the radio transmitter by Chin Poy and Agent Lee did not violate section 605, the evidence was inadmissible because it was obtained by a trespass and constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments.<sup>4</sup>

In *Gouled v. United States*, 255 U. S. 298, a federal employee entered the office of one suspected of crime under the pretext of paying a friendly visit and while there surreptitiously extracted certain papers. This was held to be an unreasonable search and seizure within the meaning of the Fourth Amendment, and the admission of the papers in evidence was held a violation of the Fifth Amendment.

<sup>3</sup> See Judge L. Hand's comment thereon in *Reitmeister v. Reitmeister*, 2 Cir., 162 F. 2d 691, 694.

<sup>4</sup> Appellant cites the dicta of the Supreme Court and this court in the *Goldman* case to support his position. In the *Goldman* case agents had entered the defendant's office and installed a listening device near his telephone. This device failed to work, however. In its place the agents used a detectaphone in an adjoining room which was placed against the walls of defendant's room. The Supreme Court said: "We hold that what was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry \* \* \* Whatever trespass was committed was connected with the installation of the listening apparatus. As respects it, the trespass might be said to be continuing and, if the apparatus had been used it might, with reason, be claimed that the continuing trespass was the concomitant of its use." 316 U. S. 129, 134.

This court had said: "Conspirators who discuss their unlawful scheme must take the risk of being overheard and the risk of having what is overheard used against them, provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception." 118 F. 2d 310, 314.

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In commenting upon the *Gouled* case in *Olmstead v. United States*, 277 U. S. 438, 463-4, Chief Justice Taft remarked:

"*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record \* \* \* There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

"The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or things to be seized." (Emphasis in original.)

In the last decade the Supreme Court has expanded the protection of the private citizen against unreasonable interference with his home, his person or his effects, but none of these decisions has directly questioned Chief Justice Taft's analysis. *Dicta*, however, in *Goldman v. United States*, 316 U. S. 129, 134, indicate that where officers, by a trespass, entered the accused's office, attached a listening device to his phone and used it successfully, evidence so obtained might be inadmissible because obtained in violation of the Fourth Amendment. One Court of Appeals has expressly gone beyond the holding of the *Olmstead* case. In *Nueslein v. United States*, 115 F. 2d 690, police officers entered a suspect's home while conducting an investigation of an automobile accident. When the home-owner appeared he admitted driving the car in ques-

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tion. The police were convinced by his appearance that he was intoxicated and they arrested him on a charge of drunken driving. Because the testimony of the police officers was admitted, the conviction of the accused was reversed. The opinion states (at page 692) "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating"<sup>5</sup> But we are not disposed to follow the extension adopted by the court in the *Nueslein* case in view of the clear statement in the *Olmstead* case that only the taking of tangible things violates the Fourth Amendment. And this is especially so when we are confronted with the facts in the case at bar. If Agent Lee's testimony is to be excluded it would logically follow, in our opinion, that Chin Poy himself would not be allowed to testify as to the appellant's admissions. No case has been cited to us, and our own researches have found none, which would exclude, because of the Fourth Amendment, testimony of a government agent merely because he concealed from the suspect, when calling at his place of business, that he was such an agent and intended if possible to extract damaging statements from the suspect. Nor do we think that the *Gouled* case can be cited for the proposition that entry by a government agent under such circumstances invariably constitutes a trespass which would render evidence thereby obtained inadmissible. The crucial fact in the *Gouled* case, as Chief Justice Taft pointed out, was that there was both an entry by subterfuge and a taking of a tangible thing. It will be noted that in the *Goldman* and *Nueslein* cases which indicate that the taking of an intangible thing may violate the

<sup>5</sup> See Professor Morgan's comments on illegally obtained evidence, "The Law of Evidence, 1941-1945," 59 Harv. L. Rev. 481, 535-41 (1946).

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Fourth Amendment, there was no entry by subterfuge. We do not think the Fourth Amendment stretches so far as to prevent the admission of statements heard by a federal employee in the accused's home or place of business whose only "trespass" is the fact that he conceals his true identity to gain information. It has long been customary for law enforcement agencies to obtain admissible evidence by this method of subterfuge,<sup>6</sup> and until otherwise instructed by the Supreme Court, we shall not interpret the Amendment to require the exclusion of statements so obtained.<sup>7</sup>

In the conversation overheard by Agent Lee on March 30, 1950 the appellant told Chin Poy that the syndicate of which the appellant was the representative could supply opium in the future. The court at once told the jury to disregard this evidence. Shortly thereafter the testimony was repeated and counsel then moved for a mistrial. Apparently the court never ruled directly on this motion and counsel did not press for a ruling. The prosecutor claims that the testimony was competent because the conspiracy was charged as continuing down to the date of the filing

<sup>6</sup> "Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received." Chief Justice Taft in *Olmstead v. United States*, 277 U. S. 438, 468. See also *Blanchard v. United States*, 5 Cir., 40 F. 2d 904, cert. denied 282 U. S. 865; *United States v. Wainer*, D. C. Pa., 49 F. 2d 789.

<sup>7</sup> In two recent Supreme Court decisions evidence so gathered appears to have been admitted: *Davis v. United States*, 328 U. S. 582; *Frupiano v. United States*, 334 U. S. 699.

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of the indictment, April 26, 1950; hence the statement made to Chin Poy, although made after the appellant's arrest, was made during the period covered by the indictment and was evidence of the crime charged. Whether this theory would justify admission of the testimony we need not say. Even assuming the evidence was incompetent, we think the court's instruction to disregard it cured the error.

It is strenuously argued that prejudicial error was committed by admitting into evidence testimony that the appellant remained silent when an accusatory statement was made by Ying in the appellant's presence after their arrest. Detective Monahan testified that he first asked the appellant if he had sold the opium or delivered it to Ying and the appellant denied that he had anything to do with it. The detective then asked Ying where he got the opium and Ying replied he got it from the appellant in the hallway of 79 Mott Street on the afternoon of January 22nd; the appellant said nothing. His counsel requested the judge to inform the jury that they should disregard the detective's conversation with Ying. No immediate ruling was made upon this request but a lengthy colloquy was had by court and counsel in the presence of the jury as to whether the appellant's silence could be considered against him as a tacit admission. The court reserved decision and asked counsel to submit authorities. Further discussion between court and counsel occurred later in the trial and at the conclusion of the prosecutor's case counsel for the appellant moved for a mistrial because of the admission of the evidence and the court's comments as to the inference to be drawn from the appellant's silence when the accusatory statement was made. This motion was formally denied. But in charging the jury the court stated that

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no admission by Ying after his arrest could bind the appellant. After stating the general rule as to silence in the face of an accusatory statement, he said that the appellant having denied the charge once did not have to deny it again. "He has denied it once and that would be sufficient."

In the light of this court's decision in *United States v. Lo Bionda*, 135 F. 2d 130, the admission of evidence as to appellant's silence when faced with Ying's accusation was erroneous, but in that case the jury was told that the accused's silence was a "circumstance which they may consider." In the case at bar the jury was told emphatically that having already denied that he gave the opium to Ying he was not obliged to deny it again when Ying made the charge in his presence. We think this cured any prejudice which might have resulted from the original admission of the evidence.<sup>8</sup> Colloquies as to rules of evidence are not ordinarily regarded by juries as of much concern to them.<sup>9</sup> Any unfavorable impression the jury may have received from the court's remarks during the colloquies, we regard as swept away by the charge.<sup>10</sup> The jury system is premised on the assumption that when the judge instructs the jury what evidence it may consider it will obey the instruction. In exceptional circumstances the prejudice from improperly admitted evidence may be too serious to be cured by a charge to disregard it.<sup>11</sup> But we do not regard the present as such a case.

<sup>8</sup> *United States v. Chiarella*, 2 Cir., 184 F. 2d 903, 910, reversed on other grounds. 341 U. S. 946.

<sup>9</sup> *Frederick v. United States*, 9 Cir., 163 F. 2d 536, 548, cert. den. 332 U. S. 775.

<sup>10</sup> *United States v. Angelo*, 3 Cir., 153 F. 2d 247, 252; see also *United States v. Aaron*, 2 Cir., 190 F. 2d 144, 146.

<sup>11</sup> See *Mora v. United States*, 5 Cir., 190 F. 2d 749, 752; *Seaboard Airline R. Co. v. Bailey*, 5 Cir., 190 F. 2d 812, 815.

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Error is asserted in the court's refusal to give 16 of the defendant's 37 requests to charge. The appellant's main brief merely enumerates the 16 requests but does not point out wherein the charge as given was defective in respect to matters covered by the refused requests. This is not an adequate way to present an attack upon the charge. We have, however, examined the 16 enumerated requests and compared them with the charge as given. It will suffice to say that we perceive no substantial error in refusal of the requests.

Judgment affirmed.

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FRANK, *Circuit Judge* (dissenting):

1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles.<sup>1</sup> Today on Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy. This appears from the following facts:

Chin Poy, a paid informer of the Narcotic Bureau, and himself a former drug addict, paid two "friendly" visits to On Lee's four-room combined laundry and dwelling. During these visits, the two men were alone most of the time. Unknown to On Lee, Chin Poy carried, concealed inside his pocket, a 3-inch microphone which picked up everything the two men said, and transmitted it to a receiving set manned by a Narcotic Agent, three or four doors down the block. This government agent, almost a year later, testified at the trial to what he had thus heard.

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<sup>1</sup> *Yick Wo v. Hopkins*, 118 U. S. 356.

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The two visits, made for the sole purpose of gathering evidence against On Lee to be used in that trial, took place after On Lee's arrest while he was at large on bail.

On Lee was convicted primarily on that Agent's testimony. The informer, Chin Poy, did not testify. But the Agent testified that, by means of the concealed radio, he heard On Lee admit in one of the conversations that he had conspired with one Ying to sell opium, that On Lee represented a narcotics syndicate in the sale, and that he would make a future illegal sale to Chin Poy. Aside from this indirect testimony<sup>2</sup> of the conversation, the only evidence tying On Lee to the offenses was the testimony of Ying, the alleged co-conspirator, who turned "states evidence" at the trial. Government agents testified to various meetings between On Lee and Ying, but the agent with whom Ying negotiated the only illegal sale proved at the trial, had never heard On Lee's name mentioned; and no opium was found on On Lee or among his belongings. He consistently denied, after arrest and on the witness-stand, any connection with dope peddling. His frequent meetings with Ying, On Lee explained by saying that he was discussing the possible purchase of a wet-wash laundry from a business friend of Ying's—a not implausible story. Except for the agent's testimony about On Lee's incriminating conversation with Chin Poy, the jury might well have believed On Lee and acquitted him. In the circumstances, then, a court must look critically at the damaging testimony of the Narcotic Agent to see if it warrants the conviction, for that testimony is the guts of the government's case.

The agent who, at a distance, heard the conversation by means of the hidden microphone (a method seemingly fan-

<sup>2</sup> How very indirect it was I shall show later.

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tastie and smacking rather of lurid gangster movies or the comic strips than of American realities) was engaged, I think, in a search violative of the Fourth Amendment. My colleagues, in rejecting this conclusion, make two arguments: The first runs thus:

As nothing tangible was taken by any federal officer, no "seizure" occurred; therefore, even if there was an illegal entry on On Lee's premises, the Fourth Amendment was not violated.

That argument means this: A federal officer, without a warrant, unlawfully breaks into a man's house. While there he overhears the house-owner utter a voluntary statement of his own criminal conduct. The officer, according to my colleagues, has not violated the Fourth Amendment, since he has seized nothing, for an oral statement is an intangible, i.e., as one cannot grasp sounds, one cannot seize them. Therefore, at the trial of the house-owner, the officer, over the defendant's objection, must be allowed to testify as to that oral statement.

But Chief Justice Vinson, when a circuit judge, speaking for the Court of Appeals, decided precisely to the contrary in *Neuslein v. District of Columbia*, 115 F. (2d) 690 (App. D. C.). There officers, entering unlawfully, overheard an incriminating oral statement. "The crucial thing 'found' in this 'search,'" said the court, "was a declaration of fact by the defendant that has become decidedly incriminating. \* \* \* The Fourth and Fifth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by unlawfully coming into his home and by placing him in custody. \* \* \* But how did the officers find

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themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right." And so the court ruled that the "officers' testimony regarding the defendant's declaration is inadmissible," adding that, although " \* \* \* the Fourth Amendment was written against the background of the general warrants in England and the writs of assistance in the American colonies," the Amendment "gives a protection wider than these abuses."

My colleagues criticize the *Nueslein* ruling as inconsistent with a statement, in the nature of *dictum*, in *Olmstead v. United States*, 277 U. S. 438. There the Court held that wiretapping did not violate the Amendment, basing its decision in large part on the fact that interception of the phone message involved no entry. The Court said: "There was no entry of the houses or offices of the defendants." This fact the Court noted five times. In passing, the Court also said, "There was no seizure. The evidence was secured by the use of the sense of hearing and that only. Citing *Gouled v. United States*, 255 U. S. 298, the Court said that in that case there was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard. The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized." Since the Court found no entry, those remarks were, in every respect, superfluous. Doubtless for that reason, Vinson, J., twelve years later, disregarded those remarks when he wrote *Neuslein*. *Neuslein* has been cited by the Supreme

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Court in *Harris v. United States*, 331 U. S. 145, 153, as a "case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime."<sup>3</sup>

And the Neuslein doctrine finds support in an earlier and a later decision: Both *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, and *Zap v. United States*, 328 U. S. 624, are based on the assumption that an illegal search occurs whenever government officials unlawfully gain access to a man's books in his home or office, and that it is immaterial that they get their information by reading, copying or photographing instead of by seizing the books and removing them.<sup>3a</sup>

<sup>3</sup> Emphasis added.

<sup>3a</sup> The *Silverthorne* case refused to allow government agents to raid a defendant's office and "study the papers [obtained in the raid] \* \* \* copy them, and then \* \* \* use the knowledge that it has gained to call upon the owners in a more regular form to produce them." The Court, per Holmes, J., rejected for once and all the argument "that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act." As recently as 1948, the Court dismissed as "a technicality" the seizure without warrant of a check during a legal inspection by government agents. Since the agents "could have taken photographs or made copies of the check and offered them in evidence without producing the originals," the seizure of the check added nothing to the government's case against the defendants and so did not violate the spirit of the Amendment. This was so only because the inspectors "obtained by lawful means access to the documents. \* \* \* They were not respassers. They did not obtain access by force, fraud, or trickery \* \* \* the knowledge they obtained concerning petitioner's conduct under the contract with the Government was lawfully obtained." See also *United States v. McCann*, 38 F. (2d) 246, 247 (S. D. N. Y.); *Lisansky v. United States*, 31 F. (2d) 846, 850 (C. A. 4); *United States v. Mandel*, 17 F. (2d) 270 (D. C. Mass.); *Bowles v. Denuizio*, 55 F. Supp. 9 (W. D. Ky.); *Takahashi v. United States*, 143 F. (2d) 118 (C. A. 9); *United States v. Dziadus*, 289 F. 837, 842 (N. D. W. Va.).

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In rejecting the reasoning of Vinson, *J.*, in *Neuslein*, my colleagues ignore the unbroken line of decisions holding that the Fourth Amendment forbids either (a) illegal searches or (b) illegal seizures. "The things here forbidden are two—search and seizure," said Miller, *J.*, concurring in *Boyd v. United States*, 116 U. S. 616, 641. For this reason, federal courts have generally excluded any kind of evidence obtained as the result of an illegal search and not merely the physical introduction in evidence of things actually seized from the defendant. In *Boyd v. United States*, *supra* (at 627), the Court said that Lord Camden's opinion in *Entick v. Carrington*, 19 Howell's St. Trials 1029, was "sufficiently explanatory of what was meant by unreasonable searches and seizures" in the minds of the men who framed the Fourth Amendment. It is notable, therefore, that Lord Camden referred to the removal of papers as but an "aggravation" of the offense in unlawful search cases. "(E)very invasion of private property, be it ever so minute, is a trespass. \* \* \* (Where) private papers are removed and carried away the secret nature of those goods will be an *aggravation of the trespass*." I think, then, that it goes against 180 years of constitutional history to say that an illegal entry, for the purposes of procuring evidence, is not a violation of the Amendment unless something "tangible" is carried away.

Our highest court has never decided that a "search" is valid merely because made by the eyes or the ears and not the hands. Indeed so to hold would be to disregard the every-day meaning of "search," *i.e.*, the act of seeking. In every-day talk, as of 1789 or now, a man "searches" when he looks or listens. Thus we find references in the Bible to "searching" the Scriptures (John V. 39); in literature to a man "searching" his heart or conscience; in

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the law books to "searching" a public record. None of these acts requires a manual rummaging for concealed objects. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property." \* \* \*  
*Boyd v. United States*, 116 U. S. 616, 630.<sup>4</sup>

So, just as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher—more accurately.<sup>5</sup>

<sup>4</sup> See also *District of Columbia v. Little*, 178 F. (2d) 13, 18 (App. D. C.), aff'd 339 U. S. 1: "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. 'Inspection' means to look at, and 'search' means to look for. To say that the people, in requiring the adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

<sup>5</sup> A dictaphone, by its very nature, conducts an exploratory search for evidence of a house-owner's guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. *Marron v. United States*, 275 U. S. 192. A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) contraband. Speech can be neither. A listening to all talk inside a house has only one purpose—evidence-gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy. The fact that the conversations here took place after On Lee's arrest emphasizes the fact that their only use would be to convict him.

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True, some look-searches and listen-searches do not run up against the Fourth Amendment. If an officer stays outside the house (or other precincts protected by the Amendment), he is not engaged in an "unreasonable" search when he looks through a window or listens at a keyhole. His activity is a "search," but not an unconstitutional one—because he has not, without the owner's consent, barged in on the constitutionally protected area. Thus a searchlight beam focused on a ship's deck is not an unreasonable search (*United States v. Lee*, 274 U. S. 559); nor is watching a house from an open field on which the officer is trespassing so long as his trespass does not extend to the house. (*Hester v. United States*, 265 U. S. 57); even peeking through a transom is apparently cricket; (*McDonald v. United States*, 335 U. S. 451). Similarly government agents may listen to conversations in a defendant's room through a detectaphone attached to their own side of the wall. *Goldman v. United States*, 316 U. S. 129. The *Goldman* case (unless as I shall later suggest, it may have been modified) teaches that men must expect official eavesdroppers, flashlight beams, spyglasses, wall-penetrating xrays, and detectaphones—in short, every sort of attempt by officials on the outside to find out what goes on in the inside of one's house.

But the Supreme Court has stood firm in protecting the inviolability of the inside from the physical presence of official outsiders, absent the insider's consent. The Amendment acts as a bar at the doorstep against such uninvited intruders. A man still has the right to be secure in his home, after he has drawn the shades, soundproofed the walls, and insulated the building against xrays. He does not have to keep up a 24-hour watch against official invaders. If the policeman at the window opens it up to come

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in for a better look (see *Davis v. United States*, 328 U. S. 582, 587, 598-599); if the agents have to break and enter in order to look over the transom of the owner's bedroom (Jackson, concurring in *McDonald v. United States*, 335 U. S. 451, 458-459); if the listening device is planted inside the defendant's room rather than on the adjoining wall (*Goldman v. United States*, 316 U. S. 134, 134)—in all such instances a violation of the Fourth Amendment occurs. See *Raine v. United States*, 299 Fed. 407, 411 (C. A. 9); *Foley v. United States*, 64 F. (2d) 14 (C. A. 5); *United States v. Phillips*, 344 F. (2d) 495, 499 (N. D. N. Y.).

In any such case, the man is no longer secure in his house: the outsiders have moved in on him. The *Goldman* case drew this distinction prettily—almost as if the Court had anticipated this very case. There the officers, illegally entering a room of Shulman, one of the defendants, planted a "listening apparatus" (a dictaphone) in that room with wires running to the adjacent room which the officers entered lawfully. The dictaphone failed to work. The officers then resorted to a detectaphone which had no wires connecting it with Shulman's room and which all was wholly within the adjacent room. Solely by means of this outside detectaphone, the officers heard defendant's incriminating conversation (carried on in Shulman's room) to which the officers testified. The defendants, said the Court, "contend that the trespass committed in Shulman's office when the listening apparatus was there installed, and what was learned as a result of the trespass, was of some assistance on the following day in locating the receiver of the detectaphone in the adjoining office, and this connection between the trespass and the listening resulted in a violation of the Fourth Amendment. Whatever trespass was committed was connected with the installation of the listening

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apparatus [the dictaphone]. As respects it, the trespass might be said to be continuing, and, if the apparatus had been used it might, with reason, be claimed that the connecting trespass was a concomitant of its use."

The *Goldman* case distinction is crucial here: If the government agent, on the outside, unaided by any device smuggled into On Lee's premises, had heard what On Lee said, the agent's conduct would have been unethical (perhaps even unlawful under state law) but not unconstitutional.<sup>6</sup> The microphone, however, was brought into On Lee's establishment without his permission. It was just as if the agent had overheard the conversation after he had sneaked in, when On Lee's back was turned, and had then hidden himself in a closet. All the agent's subsequent evidence-gathering was a result of, a concomitant of, the unlawful invasion. As recognized in *Goldman*, such be-

<sup>6</sup> Although customers may enter a man's place of business at will, it is still as immune from illegal search and seizure as his kitchen or his bedroom. Many of the leading Supreme Court cases on search and seizure have involved places of business. *Gouled v. U. S.*, 255 U. S. 298; *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385; *Go Bart. Co. v. U. S.*, 282 U. S. 344; *U. S. v. Lefkowitz*, 285 U. S. 452. Government agents cannot break into a store any more than they can break into a home, or force entry against the owner's will. *U. S. v. Rabstein*, 41 F. (2d) 227 (D. N. J.). They can, of course, enter in the same manner as customers and observe what is going on, including criminal acts. *Dillon v. U. S.*, 279 F. 639 (C. A. 2). They may seize contraband in plain sight. But they cannot enter the establishment and once inside conduct an unauthorized search or seize articles not in plain sight. Thus officers entering a drugstore to make a routine inspection of records could not sneak into an enclosure marked "Private," and seize illegally stored liquor hidden inside. *In re Lobosco*, 11 F. (2d) 892 (E. D. Pa.). A businessman issues an invitation to the public to come into his establishment, but once inside he can control their activities while on his premises, and he has the right at any time to order them out. If they stay, after he has ordered them to leave, they become, as of that time, trespassers on his property.

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havior is altogether different from that of an officer merely listening in an adjoining room which is no part of the defendant's constitutionally protected precincts. Here the agent, in effect, came inside that area, and did so without On Lee's consent.

The situation is no different than if Chin Poy had secretly installed the radio inside the house. On Lee agreed to Chin Poy's presence in his laundry; he did not agree, nor was he given the chance to disagree to what, for all practical purposes, was the presence of someone else altogether. The invading microphone enabled a third person, about whom On Lee knew nothing, to be present at the conversations. It accomplished the same purpose as if, and should therefore be treated as if, the agent had smuggled himself into the room to listen behind closed doors, or as if the agent had been a midget and had been hidden in a bag carried by Chin Poy on to On Lee's premises.

I grant that, as long as the Goldman Doctrine endures, the domain of Fourth-Amendment privacy will be rather restricted, and that it will become more so as new distance-conquering devices, for seeing, hearing and smelling, are invented. But I believe that, under the Amendment, the "sanctity of a man's house and the privacies of life" still remain protected from the uninvited intrusion of physical means by which words within the house are secretly communicated to a person on the outside. A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave,

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some inviolate place which is a man's castle.<sup>7</sup> Were my colleagues correct, the Fourth Amendment would be inoperative if a government agent entered a house covered with a "cloak of invisibility"—a garment which ingenuity may soon yield.

This brings me to my colleagues' second argument which runs thus:

The introduction of the microphone, without On Lee's consent did not render unconstitutional the act of the distant agent in listening to the conversation; for that agent was just like a spy who, gaining entrance by concealing his identity, hears and testifies to an admission made by a criminal; testimony so obtained by a spy (say my colleagues) has never been held inadmissible under the Fourth Amendment.

All else aside, this argument not only wipes out the *Goldman* case distinction but also ignores the distinction between (a) entry with the owner's consent when the consent is procured by deception, and (b) lack of any consent to the entry. This case is of the latter kind. For all prac-

<sup>7</sup> The famous maxim about an "Englishman's house is his castle," was perhaps a concept quite foreign to common law. Radin, pointing out that the common law recognized no such rule against the processes of the King, says that the true origin of the sanctity-of-a-man's-house idea lies in the Roman law where the maxim was honored in practice as well as theory: No Roman citizen could be dragged from his home by any law enforcement official. Digest, 2, 4, 18. The idea, says Radin, appears first in Gaius' *Commentaries on the Twelve Tables*, and was later picked up by Cicero, *De Doma Sua*, §109. Radin further notes that the idea of the inviolability of the house was also part of German and French law. According to Radin, the lawyers in the colonies were well acquainted with Roman and Continental legal writings. Radin, *Rivalry of Common Law and Civil Law Ideas, in American Colonies*, 423-427 in *Law, A Century of Progress, 1835-1935*.

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tical purposes (as I have tried to show), the agent entered On Lee's premises without On Lee's knowledge and therefore minus his consent. That uninvited entry constituted just as much of a constitutional infringement as if the agent had forced his way in. To hold otherwise is to turn the amendment into a sorry joke. It is to say to a police-officer: "Take a hint. Don't bludgeon your way in. Wait till the owner is not looking, and then skulk in. The Constitution forgives a sneak's entry."

This is not at all what the courts have said when they have given a limited sanction to evidence obtained by spies who, by lies, have procured an owner's consent both to enter and to acts done by the spies after entry. Typically, in such a case, the owner, engaged in an illegal enterprise, expressly or tacitly invited prospective customers (or the like) to enter without being required to satisfy any conditions; the invitation was not conditioned on the entrant's not being a government official; the spy gained entry because the owner mistakenly trusted that this seeming customer would not disclose his observations to the government. These were the facts in *Davis v. United States*, 328 U. S. 582, and in *Blanchard v. United States*, 40 F.(2d) 904 (C. A. 5). *United States v. Trupiano*, 334 U. S. 669, relied upon by my colleagues to support their spy analogy, involved an informer who was hired by the defendants as a workman in an illegal still and who reported his observations to the police. The workmen, like the customers, had been invited by the owner onto the premises for a specific reason; and his entrance was not illegal because of the use to which he put his observations.

It is one thing to hold that the Amendment does not safeguard a man from such errors in judging the character of those whom he lets into his house; it is another to hold

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that the Amendment does not protect him from officers who get in when he does not know it. We shudder at the nocturnal "knock at the door" by searchers armed with no warrants. How much worse is a secret search by a knockless, sneaky, unknown entrant. In the first case, the citizen has the opportunity to question the searcher's authority, perhaps to dissuade or resist. In the second, he is powerless against an unseen snooper.<sup>7a</sup>

The spy cases are, at best, difficult to reconcile with *Gouled v. United States*, 255 U. S. 278, where it was held that a government agent, paying defendant a "friendly visit," conducted an illegal search when he went through defendant's papers without defendant's knowledge. Assuming, however, that *Gouled* has been virtually overruled, the spy cases must, I think, be deemed to go to the very edge of unconstitutionality. No upper court, up to today, has gone further. In *Fraternal Order of Eagles*, 57 F. (2d) 93 (C. A. 3),—overruling in effect *United States v. Warner*, 49 F. (2d) 789 (W. D. Pa.) cited by my colleagues—entrance was limited to a special class possessing credentials, and the government spies used stolen credentials which gave them the false appearance of members of that special class. The court held inadmissible the evidence they procured.<sup>8</sup>

<sup>7a</sup> See *United States v. Jeffers*, — U. S. — (November 13, 1951) as to officers whose "intrusion was conducted surreptitiously. \* \* \*

<sup>8</sup> The Court said, in passing, that their entrance constituted a search; "The object of the entry was to discover as much as possible and to use what they could see as a basis for an application for a search warrant. When the agents first entered, they search with their eyes, and saw the very thing that they were looking for. \* \* \* The government may not make an entry by means of false representations, search as fully as possible without arousing suspicion, and later make the fruit of that entry

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The practice of broadcasting private inside-the-house conversations through concealed radios is singularly terrifying when one considers how this snide device has already been used in totalitarian lands. Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus.<sup>9</sup> Orwell, depicting the horrors of a future completely regimented society, could think of no more frightening instrument there to be employed than the "telescreen" compulsorily installed in every house. "The telescreen," he writes, "received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper would be picked up by it; moreover, so long as he remained in the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given

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and search the basis of what otherwise might be a legal search and seizure."

See also *People v. Dent*, 371 Ill. 33, 19 N. E. (2d) 1020, where the court suppressed evidence obtained by policemen who kicked at defendant's door and were told to "Come In." After entering, they saw illegal number slips on the table and seized them. The search and seizure were held unconstitutional (under Illinois law) because the policemen had not volunteered their identities and the purpose of their visit before accepting the defendant's invitation to enter.

<sup>9</sup> See Bramstedt, *Dictatorship and Political Police* (1945) 144:

"Visitors were often led by their friends into the bathroom, a room not easy to tap, and there they exchanged the latest news in whispers. Diplomats and officials met in one of the public parks in order to escape eavesdroppers—mechanical and otherwise. As a result in many houses a tea cosy was put around the telephone receiver as a wise preventative measure. During the war people in Berlin who wanted to talk freely still either disconnected their telephones from the wallplugs or put them under their desks."

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moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live, did live, from habit that became instinct, in the assumption that every sound you heard was overheard, and, except in darkness, every movement scrutinized."<sup>10</sup> Such a mechanical horror may soon be the dubious gift of applied science. My colleagues' decision, by legitimizing the use of such a future horror, invites it.<sup>11</sup> I think that the decision is wrong and that the invitation should not be issued.

2. I consider the decision wrong because of the Fourth Amendment. I am not sure it is correct even aside from the Amendment. I have in mind the post-Olmstead doctrine of *McNabb v. United States*, 38 U. S. 332, and *Anderson v. United States*, 318 U. S. 350, i.e., that the federal courts will not receive evidence obtained by federal officers through violation of federal or state laws.<sup>12</sup>

<sup>10</sup> Orwell, "1984," p. 4.

<sup>11</sup> Such a precision-minded society as Orwell describes is, fortunately, not our only alternative. We can knowingly sacrifice 100% accuracy in crime-detection to freedom. See London Times Lit. Supp., Oct. 12, 1951, p. 642 "if you want to \* \* \* enjoy some personal freedom \* \* \* in the new \* \* \* society \* \* \* you must be prepared to live in the interstices of the society and to put trust in its imprecisions."

<sup>12</sup> I recognize that my suggestion would mean that the *Olmstead* and *Goldman* cases would be in effect overruled, but on non-constitutional grounds. Professor Morgan suggests that this result would be consistent with the *McNabb* holdings. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 535-541 (1946).

It should be noted that the invasion of On Lee's privacy involved a trespass and was therefore a far more serious wrong than the non-trespassing eavesdropping involved in the *Goldman* case. See A. L. I., Restatement, Torts, §16; Prosser on Torts, §18 (1941).

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3. Apart from the radio evidence, I think the conviction should be reversed on still other grounds. Early in the trial, a detective was allowed to repeat the accusatory statement of Ying (On Lee's alleged co-conspirator) made against On Lee after his arrest, when he was present. The judge received this evidence on the theory that, since On Lee had not denied the statement, he had thus admitted by silence what he had not denied. The judge was wrong. In *United States v. Lo Biondo*, 135 F. (2d) 130 (C. A. 2), we held that a defendant need not deny any accusations made to his face after his arrest, and that his silence in such circumstances cannot be construed as an admission of his guilt. The trial judge in the instant case later partly realized his mistake, and, by his charge to the jury, sought to correct the misimpression. In a case where the evidence against the defendant was particularly substantial or convincing, I might agree that such an error is harmless, if thus subsequently corrected. But in this case, the evidence was anything but overwhelming, and a misimpression of this sort might easily sway the jury toward conviction.<sup>13</sup> To make matters worse, the judge here, in seeking to correct his error, positively harmed the defendant's case in the jury's eyes: The judge announced that, if the defendant had denied his guilt *before arrest*, he did not have to repeat his denials later after arrest.<sup>14</sup> In the

<sup>13</sup> "The naïve assumption that prejudicial effects can be overcome by instructions to the jury, \* \* \* all practicing lawyers know to be an unmitigated fiction." Jackson, J., concurring in *Krilewitch v. United States*, 336 U. S. 440, 453. See also *Skidmore v. Baltimore & Ohio R. Co.*, 167 F. (2d) 54 (C. A. 2).

<sup>14</sup> The full charge on this issue reads: "I will charge the jury that if *before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest \* \* \* was told or heard Gong saying: 'You gave it to me';

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charge, this was the only exception to the general rule of guilt by silence. Since the record contained no evidence that On Lee had denied guilt *before* arrest, the jury might well have believed that On Lee did not come within any exception and must therefore have admitted his guilt by remaining mute.

Such an error should be deemed harmless, if at all, only where the government's case against the defendant is "strong."<sup>15</sup> But here it was not. As already noted, the pivotal evidence was the agent's testimony about conversations he overheard. The following is therefore important: Chin Poy, the informer, was not called by the government and therefore did not himself testify to those conversations. Had the agent attempted to testify to what Chin Poy told him of these conversations, his testimony would have been excluded as hearsay—weak hearsay, at that, since no reason was given for not calling Chin Poy. The

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you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so.

The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.

"Now I modify that by this consideration: if *before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would say that silence did not constitute an admission and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he had already denied it that it was not so if the statement was made in his presence. He has denied it once and that is sufficient."

<sup>15</sup> *Kotteakos v. United States*, 328 U. S. 750; *Berger v. United States*, 275 U. S. 78.

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sole basis of receiving the agent's testimony was that he stated he had heard the conversations, i.e., was not merely retelling what Chin Poy had told the agent out of court. Yet, in the course of cross-examination of the agent, it came out that he had to rely on Chin Poy's out-of-court statements about the conversations. Consider these facts:

- (a) The agent's receiving set, on at least one occasion, was supposed to have been hooked up with a recording device in a nearby truck which could have made a record that could have been played to the jury. But the agent testified that he had made no such record because "the recorder was not working that evening."
- (b) He also testified that the kind of radio-device he utilized often failed to work properly because of noisy surroundings or transmitted unintelligible noises.
- (c) He further testified that he did not take notes of all the conversations while they were going on.
- (d) Only an hour or so later, did he make notes and memoranda concerning what he had heard. And the memo was made after comparing his notes with those of Chin Poy, so that the agent's memo was, at best, a collaborative product.
- (e) To make matters far worse, the agent did not use his notes and memoranda to refresh or prompt his recollection, although he deliberately tried to give the appearance of doing so. For, during his direct testimony, he kept referring to a written statement. On cross, however, he confessed that this statement was not his own—since his own notes and memos, he said, had been "destroyed" or "filed away." The paper he used to refresh his recollection in testifying was a written statement made by Chin Poy of his recollection of the conversations. So that, in order to testify, the agent had to use out-of-court statements of Chin Poy, a man never seen or heard by the jury and never subjected to cross-examination. Surely a case resting on the agent's testimony is not "strong."

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IN THE

# Supreme Court of the United States

October Term, 1951

No. 543

ON LEE, Petitioner

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

HENRY K. CHAPMAN  
GILBERT S. ROSENTHAL  
*Attorneys for Petitioner*

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**PETITIONER'S REPLY BRIEF**

The within reply Brief is being submitted solely for the purpose of correcting certain errors contained within the Brief submitted by the Solicitor General in opposition to the within application for certiorari.

Taking them in chronological order as they appear in the aforementioned Brief the first item is found within the footnote "5" appearing at page 10. There it is stated that defense counsel objected to the testimony of Agent Lee concerning the broadcast of the conversation had between Chin Poy and petitioner solely on the ground that it related to another transaction and reference is made to pages 106-8 of the Record. A reading of the Record discloses that this is in error and that at page 104 a general objection was made by counsel for the petitioner in the trial court. After Agent Lee testified concerning Chin

Poy's entry into the combined home and place of business of the petitioner, we find the following in the Record near the bottom of page 104:

"Q. Only customers. A. Only customers that came in and out. I overheard their conversation and On Lee admitted—

Mr. Rosenthal: That is objected to."

In arguing that no harm was committed by the admission of the radio conversation overheard while Chin Poy was in the combined place of business and home of the petitioner the Government states at pages 12 and 13 of their opposing Brief, that the subsequent admission alleged to have been made by petitioner to Chin Poy, while they were on the street, that he was an agent for a syndicate, negates any argument in opposition to the admission of the other testimony and reference is made to pages 113-4 of the Record. A careful reading of these pages discloses that the only time in his testimony that Agent Lee claimed petitioner had made an admission or referred to the transaction resulting in his arrest was at the first meeting between Chin Poy and the petitioner held in the petitioner's combined home and place of business.

When Agent Lee commenced testifying concerning the second alleged overheard conversation, which it is claimed took place on a street in New York City, we find objection being made by trial counsel and the following appears in the Record:

"Mr. Rosenthal: The second conversation is not claimed, I do not believe, to have anything to do with the transaction charged in this indictment.

The Court: I understand that" (R. 113-4).

It is, therefore, respectfully submitted that it is apparent that even if it were to be believed that the petitioner made

an admission on the street to Chin Poy that he was an agent for a syndicate, it did not in any manner refer to the transaction of January 22nd, 1950, which was the basis of the arrest and prosecution and no verdict of the jury could be claimed to be predicated upon this testimony.

It is further urged in the Brief submitted in opposition to the within petition that since the alleged conversations had between Chin Poy and the petitioner, in which the short-wave radio was used, took place in petitioner's laundry to which the general public was invited, petitioner can not now be heard to complain about the invasion of his premises by Chin Poy entering by means of subterfuge, nor can petitioner now claim this was tantamount to a trespass by a Government agent. The Government completely ignores the testimony of petitioner and the comments of the trial court in respect to the visits of Chin Poy to the premises of petitioner. On cross examination concerning the visit of Chin Poy to his premises we find the petitioner testifying as follows:

" \* \* \* A. I never said anything like that to him. I never speak to a man that uses drugs and I chased him away from my place.

Q. You say you chased him away? A. Yes, I chased him away." (R. 295).

Shortly thereafter the Court, in commenting upon the visits of Chin Poy to petitioner's premises, said:

"The Court: He came back after that. He was not asked to come back, you used the word 'invite'. He did not make the statement 'come back'. He said that he came back of his own choice. That runs through his testimony." (R. 296).

Further on we find the following testimony of petitioner in respect to the visits of Chin Poy:

“Q. Did you ask him to come over to see you at your laundry in Hoboken? A. Every time I chased him away.

. . . . .

A. I don't remember the exact day. All together he came to my laundry twice and every time I chased him away” (R. 298).

In reading the foregoing testimony of petitioner it must be borne in mind that this was developed upon cross examination by the District Attorney, who was in effect making the petitioner his own witness since it concerned collateral matter which had not been alluded to upon the direct testimony of the petitioner. Despite these statements and denial of petitioner as to invitation either general or express, to Chin Poy to visit him at petitioner's premises, the learned District Attorney did not see fit to produce Chin Poy to contradict the testimony of petitioner and it is respectfully submitted that, therefore, both the District Attorney and the jury were bound by these answers. This, we believe, effectively destroys the argument appearing at page 13 of the opposing Brief that since the general public might be considered to be invited to enter petitioner's premises the Government employee, Chin Poy, could not be considered as a trespasser or intruder.

In *Davis v. U. S.*, 328 U. S. 582, cited in the Government's Brief, the facts were altogether different since in that case the Government agents actually transacted business on the premises in question and observed other illegal transactions taking place in their presence.

## CONCLUSION

Petitioner respectfully submits that no good cause having been offered in opposition to the petition for a Writ of Certiorari, same should be granted.

HENRY K. CHAPMAN

GILBERT S. ROSENTHAL

*Attorneys for Petitioner*

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**BRIEF FOR PETITIONER**

GILBERT S. ROSENTHAL

HENRY K. CHAPMAN

*Attorneys for Petitioner*

New York City, N. Y.

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IN THE  
**Supreme Court of the United States**

October Term, 1951

No. 543

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ON LEE,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF FOR PETITIONER**

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**Opinions Below**

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the Second Circuit was by a divided court. Swan, *Ch.J.*, wrote the prevailing opinion in which Clark, *C.J.* concurred. Frank, *C.J.*, wrote the dissenting opinion. These opinions are reported at 193 F. 2d 306, 311 and are also printed at pp. 43 and 52 of appendix annexed to original petition for certiorari.

## Jurisdiction

The judgment of the Court of Appeals was entered on November 21st, 1951. The petition for a writ of certiorari was filed January 18th, 1952 and certiorari was granted March 3rd, 1952.

The jurisdiction of this Court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, §1254, United States Code.

## Questions Presented

In the instant case, was it not prejudicial error to admit evidence of conversations allegedly held some six weeks after petitioner's arrest, between petitioner and a special employee of the Government, one Chin Poy, the conversations taking place in petitioner's combined home and place of business at Hoboken, New Jersey, Chin Poy having entered the premises by stealth and subterfuge and remaining contrary to the wishes of petitioner (R. pp. 295-6, 8) and carrying concealed upon his person a microphone and a miniature radio transmitter thus causing the conversations to be radioed to the world outside of petitioner's home and place of business where it could be picked up by a radio receiving set operated by a United States Treasury Department Narcotic Agent upon the same wave length as the transmitter (R. pp. 163-4), said agent being the only one who testified in respect to the alleged conversations, Chin Poy, the special employee who allegedly held the conversation with petitioner not being produced by the government in the Court below and no excuse or explanation being offered for his absence (R. p. 178), the Narcotic Agent's testimony being based upon alleged refreshing of his memory by the use of secondary evidence consisting of notes claimed to have been

prepared by the absent special employee, Chin Poy, some time subsequent to the event (R: pp. 147-50). Should not this evidence have been excluded, having been obtained:

(a) In violation of petitioner's Constitutional Rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States?

(b) In violation of the provisions of Section 605 of Title 47 of the United States Code, the Federal Communications Act?

Should not this evidence also be ruled inadmissible by reason of the inherent power of the Court to formulate rules of evidence for Federal Criminal Trials, guided by the consideration of justice?

Objection to the admission of the said evidence was duly taken (R. p. 104).

Another question presented in the instant case is: was it not prejudicial error to admit evidence of accusatory and incriminating admissions alleged to have been made by a co-defendant subsequent to arrest and in the presence of the petitioner, to which petitioner made no reply, said evidence being received by the trial judge on the theory that since the petitioner had not denied the statement he had, by his silence, admitted what was not denied (R. pp. 73-80, 102-3, 136, 137-9, 217, 219-222), particularly where it affirmatively appears in the Record in the instant case that subsequent to arrest and prior to the making of the alleged accusatory statement by the co-defendant, the petitioner had denied any connection between himself and the opium sold and delivered by the co-defendant to the federal narcotic agent? (R. pp. 53, 63). Objection to the admission of this evidence was taken timely (R. pp. 73-4).

Was this error corrected by the erroneous charge of the trial court? (R. pp. 360-1).

Would the charge of the trial court, even if accurate which it was not in the instant case—correct and cure the harm done by the erroneous admission of this evidence coupled with long colloquy and discussion in and out of the presence of the trial jury?

## **Constitutional Provisions and Statutes Involved**

### **Constitution of the United States, Amendment 4:**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

### **Constitution of the United States, Amendment 5:**

" \* \* \* ; nor shall be compelled in any criminal case to be a witness against himself, \* \* \* ."

### **Section 173, Title 21, United States Code:**

"173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe \* \* \* ."

Section 174, Title 21, United States Code:

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

"174. Same; penalty; evidence.—If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, \* \* \* contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years \* \* \*"

Title 26, Section 2553(a), United States Code:

"§2553. Packages—(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; \* \* \*"

Title 26, Section 2554(a), United States Code:

"§2554. Order forms—(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Title 18, Section 371, United States Code:

"§371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Title 47, Section 605, United States Code is set forth at length in footnote 15, pages 37-8 herein.

### STATEMENT

Petitioner was arrested on Sunday, February 12th, 1950 in Chinatown in the City of New York along with his co-defendant, Gong Len Ying<sup>1</sup> by Federal Narcotic Agents assisted by New York City Detectives. Petitioner resides and works in Hoboken, New Jersey immediately across the Hudson River from New York City. He has lived there for over twenty years with his wife and son and runs a chinese hand laundry working fifteen hours a day, six days a week.

The government charged him with participating in the sale of a pound of opium made on January 22nd, 1950 by Ying to Federal Narcotic Agent Gim and with conspiracy to sell opium. The co-defendant Ying pleaded Guilty to the indictment (R. p. 203) and was one of the principal witnesses for the Government on the trial of petitioner. As a reward for his services the district attorney recommended

<sup>1</sup> Hereinafter referred to as "Ying".

that he be given a suspended sentence and he was sentenced to six months imprisonment (R. p. 385).

Ying was in the business of selling laundry supplies and chinese food-stuffs to operators of chinese laundries in New Jersey (R. p. 222). He owned and operated his own truck for his business.

On Sunday, January 22nd, 1950 he was introduced to Agent Gim in Chinatown and after some discussion agreed to sell to him a pound of opium. Collecting in advance he claimed that he then obtained the package of opium from petitioner at 79 Mott St. in New York City (R. p. 204).

His testimony as to other subsequent meetings with Agent Gim was vague and not consistent with that of Gim. He did state that when they met on February 12th, 1950, Gim asked him to get twenty pounds of opium. He called petitioner and asked him to come to New York (R. pp. 213-5). When petitioner arrived they had tea together and he asked petitioner about getting twenty pounds of opium to which he claimed petitioner replied that he didn't know if there was any available (R. pp. 215-6). Petitioner was alleged to have said that if there were any money he would see what could be done. Ying went back and forth between Gim and petitioner several times but no deal was consummated and both petitioner and Ying were placed under arrest when leaving the restaurant (R. p. 217).

Agent Gim testified in detail concerning his meetings with Ying and his purchase of a pound of opium from him for \$550.00 on the very first time he met him (R. p. 7). In considering the entire case it is interesting to note that Agent Gim and Ying arrived at a price for the opium after considerable bargaining and bickering and without Ying consulting anyone else (R. pp. 24-5).

Agent Gim never saw the petitioner in any of his transactions with Ying until after the arrest (R. pp. 51-2). This included his meeting with Ying on Sunday, February 12th,

the date of the arrest when he claimed to have had several conferences with Ying concerning the possible purchase of twenty pounds of opium.

Another Federal Narcotic Agent, Lawrence Lee, corroborated Gim's testimony about his dealings with Ying.

After the arrest of petitioner the Government apparently became apprehensive of the fact that their case against him was woefully weak. In an effort to bolster the case they transported one, Chin Poy, a government informer and euphemistically described in the Record as a "special government employee" to Hoboken, New Jersey, on March 30th, 1950 and a subsequent date.

Chin Poy knew petitioner and called at his combined place of business and home in Hoboken for the purpose of attempting to elicit an admission. Petitioner testified that he had nothing to do with Chin Poy and attempted to and did chase him away (R. p. 998).

The Government never called Chin Poy as a witness nor was any excuse offered for the failure to produce him in Court (R. pp. 175-8).

Instead, the trial Judge permitted Agent Lee, over the objection of petitioner's counsel (R. p. 104) to testify that Chin Poy had concealed upon his person a microphone and a radio transmitter and that Agent Lee stood in a vestibule of a building down the street from petitioner's premises and by means of a short wave radio receiving set intercepted the broadcast of the conversations (R. p. 104).

Lee never made any notes at the time nor was any recording device used. He claimed that he did attempt to use a recorder on one of the occasions but that it didn't work (R. pp. 196-7). Lee claimed he was testifying purely from memory refreshed by alleged writings of Chin Poy (R. pp. 109-10, 196-7). Agent Lee was permitted to testify in all as to two conversations had between Chin Poy and peti-

tioner in petitioner's combined home and place of business. Both of these talks allegedly took place more than six weeks after petitioner had been arrested and released on bail. He claimed petitioner admitted to Chin Poy that the opium in question was not his but he represented a syndicate.

During the course of Lee's cross examination he admitted that after the arrest he had gone to 79 Mott Street, in New York City, with petitioner, where Ying claimed he had obtained the pound of opium on January 22nd, but that none of petitioner's five keys fitted any of the apartments there (R. p. 169).

From the first day of the trial and throughout the trial the District Attorney attempted to get before the Court and jury the fact that Ying, after their arrest, made an accusatory statement implicating petitioner and that petitioner made no reply. The first witness through whom he attempted to develop this line of testimony was New York City Detective Monahan (R. pp. 73-5). This was done even though the witness had already testified that petitioner had, prior to hearing Ying's statement, denied any connection with Ying or the opium in question (R. p. 73).

Petitioner's attorney immediately objected and there was lengthy colloquy between the Court and both counsel in the presence and hearing of the jury, the Court going so far as to state during this colloquy:

"Now I will say is it a principle of law that if a man hears some accusation made against him and he doesn't reply, is that evidence against him? \* \* \*

The Court: I understand from the witness—correct me if I don't state the testimony properly—the defendant was first asked and he said he never sold any opium or had anything to do with it. Then in his presence the other man says he got it from him. Is the fact that he didn't reply evidence against him?

Mr. Rosenthal: No, your Honor.

The Court: I think it may well be. I am not speaking about conspiracy" (R. p. 76).

The District Attorney also injected himself into this discussion and in the presence and hearing of the jury offered the following proposition of law:

"Mr. Martin: It is a matter for the jury to consider.

The Court: What is that?

Mr. Martin: I submit it is a matter for the jury to consider why he did not contradict" (R. p. 77).

The entire discussion on this question of evidence when it was first raised during the trial appears at pages 73 to 80 of the Record.

Although the District Attorney obviously knew better than the trial judge that evidence of this type was not admissible, he persisted in his efforts to get the evidence before the jury and tried to obtain Agent Lee's testimony (R. pp. 102-3), and that of the co-defendant Ying (R. pp. 217-21). It almost appears as a deliberate effort on the part of the District Attorney to "foul out". This subject matter and testimony is treated in detail under Point II of the within brief.

The petitioner, defendant below, not only took the stand in his own behalf (R. pp. 265-301), but also called character witnesses (R. pp. 239-41; 242-3).

Arthur Compton, an elderly gentleman, retired assistant manager of Marine Division of D.L. & W. Railroad lived right across the street from petitioner's combined laundry and home. He knew petitioner for five or six years and described the long hours and arduous work of petitioner. Mr. Compton stated petitioner's reputation was excellent

and that even his landlord spoke well of him (R. pp. 239-41).

Eng See Git knew petitioner for over fifteen years and was able to describe his reputation and good character among the people of the Chinese race as excellent (R. pp. 242-3).

Elsie Lee, his wife, came to petitioner's defense and testified concerning previous improper advances made to her by Ying, including the suggestion she divorce petitioner and marry him. She also described how she and petitioner eked out a living by working from 9 A.M. in the morning to midnight (R. p. 260).

On Lee denied any connection with Ying's dealings in opium (R. pp. 272, 274). He told the typical story of a hard working chinese laundryman who even at the age of 62 was seeking to advance and better himself (R. pp. 267-8). This was his first conflict in any form with the law.

His meetings with Ying on January 22nd and February 12th, 1950, both Sundays, in New York's Chinatown, were innocent and caused by Ying's luring him there to supposedly discuss the possible purchase of a wet wash laundry which Ying had told him was for sale. Ying claimed to have learned of it through his business of serving various chinese laundries in the metropolitan New Jersey area with foodstuffs and laundry supplies (R. pp. 223, 267).

## SUMMARY OF ARGUMENT

I. The receipt by the trial Court, over the objection of the attorney for the petitioner, of the testimony of Federal Narcotic Agent Lee, of conversations allegedly had between Chin Poy, a Government special employee and the petitioner, which conversations it was claimed were overheard by Agent Lee through the use of a radio-transmitter operated by Chin Poy and concealed upon his person and a radio receiver operated by Agent Lee, was error prejudicial to the petitioner and this testimony should have been excluded by reason of the fact that:

A. The method and means used in obtaining this evidence was in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States.

B. The admission of this evidence was in violation of the petitioner's right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.

C. The Special Government Employee having obtained admission to petitioner's combined home and place of business by subterfuge and remained in his premises after having been ordered out by the petitioner, the entry was tantamount to and actually was a trespass upon the premises of petitioner and was, therefore, illegal and improper.

D. The within case is distinguishable from *Olmstead v. United States*, 277 U. S. 438, because here we have an actual trespass and invasion of the petitioner's premises by a Government Employee, Chin Poy, whereas in the

*Olmstead* case there was no trespass or entry upon the physical premises of the defendants and also because in the instant case the search made by use of electronic devices, to wit: the shortwave radio sending and receiving sets operated by government employees, and the seizure of the conversation alleged to have been held between petitioner and the Government Employee, Chin Poy, was of and concerning a conversation which by no stretch of the imagination can it be claimed the petitioner intended to project or permit to go beyond the immediate environs in which it was held and the ears of Chin Poy, whereas, in the *Olmstead* case by reason of the use of the telephone it was self evident that the defendants desired and intended to project their respective voices and words beyond the confines of the place or places where the words were uttered.

E. Even though this case is distinguishable from the *Olmstead* case and a reversal by this Court of the conviction in the within case may not necessarily involve an overruling of the *Olmstead* case, it is respectfully submitted that by reason of the growth of modern science and particularly of electronic devices and their use by employees and agencies of the Federal Government, this Honorable Court should, at this time, in order to preserve the guarantees contained within the Fourth and Fifth Amendments of the Constitution of the United States and to permit one living in the United States of America to feel and believe that their rights exist under the aforementioned amendments, re-examine and overrule the doctrine laid down in the *Olmstead* case and rule that the obtaining of evidence by Federal employees or agencies of personal and private conversations held within the four walls of a man's home, place of business or office, or over his telephone lines or other means of legal communication, should and must be

prevented and the offering into evidence of same be precluded as being in violation of the Fourth and Fifth Amendments of the Constitution of the United States. A ruling to the contrary by this Court, at this time, will, of necessity, emasculate the safeguards provided under these Amendments.

F. If this Court were to rule the evidence complained of was not obtained in violation of the Fourth Amendment, it should be excluded by reason of its very nature as being in violation of defendant's rights guaranteed him under the Fifth Amendment for permitting one, other than the person to whom the alleged statement was made by defendant, to testify concerning same, is the equivalent of forcing the defendant to testify against himself, which is prohibited under the Fifth Amendment.

G. The interests of justice in this case and in future cases which will be developed and presented in the various Federal Courts require that this Honorable Court exercise its inherent power to formulate rules of evidence in federal criminal trials and reject evidence obtained in the manner and by the devices used in the instant case, regardless of whether or not there be any finding that such evidence was obtained in violation of the Fourth and Fifth Amendments of the Constitution.

H. The use of the walkie talkie device and the interception of the broadcast made over it was in violation of the provisions of §605 of Title 47 U. S. C., commonly known as the Federal Communications Act, and of the rules and regulations of the Federal Communications Commission.

II. The trial court committed serious and prejudicial error in admitting into evidence alleged accusatory statements made by petitioner's co-defendant, Gong Len Ying, subsequent to their arrest and to which petitioner made no response.

A. The admission of this evidence was particularly offensive in view of the testimony that when questioned separately petitioner had denied any connection with his co-defendant in respect to dealings in or about opium.

B. The weight of the evidence and the seriousness of the error was magnified by the constant and varied efforts of the District Attorney at the trial to get this evidence before the trial jury and also by the lengthy colloquy held by the trial court with counsel for both sides, in the hearing and in the absence of the jury, and the opinions and statements expressed by the trial Judge in the hearing and in the absence of the jury.

III. The charge of the trial court containing an erroneous statement of fact not only did not cure the error committed by the admission of the aforementioned evidence, but in fact greatly prejudiced the petitioner by submitting to the jury for its consideration a factual situation which did not exist.

A. The trial court repeatedly in its charge conceived a situation that was not in existence by instructing the jury that if they found that

*"If before the arrest<sup>2</sup> the petitioner made a denial, then it was not incumbent upon him to repeat his denial."*

<sup>2</sup> Emphasis Supplied.

There is absolutely no evidence in the Record concerning any questioning of the petitioner or statements made by him to officers prior to and before his arrest.

B. The efforts of the trial court to cure its error in the admission of this testimony by its charge to the jury could not possibly be sufficient to outweigh the harm done during the trial by the admission of the evidence in question, the constant reference to it by the trial court, the many and studied efforts of the District Attorney to get it before the trial jury. This is particularly true by reason of the weak case presented by the Government concerning the guilt of the petitioner herein.<sup>3</sup>

## A R G U M E N T

### P O I N T I

The receipt of the testimony of Agent Lee concerning conversations between Chin Poy and petitioner allegedly overheard by means of the use of a radio transmitter operated by Chin Poy and a radio receiver operated by Agent Lee was error prejudicial to the petitioner.

Over the objection of counsel, federal narcotic agent Lee was permitted to testify to the receipt by radio of radio broadcasts of conversations alleged to have been had between Chin Poy, a special Government employee, and the petitioner. (R. p. 104). This testimony was objectionable and highly prejudicial to the petitioner and should

<sup>3</sup> See dissenting opinion of Frank, J., page 69 of appendix to Petition for Certiorari, 193 F. 2d 306.

have been excluded for three reasons which are discussed at length hereinafter.

This issue and question has never been previously ruled upon by the Supreme Court and the importance of the question involved is shown by the opening paragraph of the dissenting opinion of Frank, *C.J.*<sup>4</sup>

- (a) The evidence of the alleged conversations between Chin Po Government Special Employee, and the petitioner, allegedly overheard by operation of shortwave radio was inadmissible having been obtained in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States and in violation of his right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.

This question has been explored at great length in the dissenting opinion of Frank, *C.J.*, in the instant case (193 F. 2d 306, 311). The issue has been discussed so fully and lucidly by Judge Frank that it is with extreme difficulty at this time that petitioner's counsel restrains himself from offering the said dissenting opinion as petitioner's brief herein and attempts to enlarge upon same. That counsel for petitioner is not alone in the expression of the foregoing opinion concerning the clarity and forthrightness of the dissenting opinion of Judge Frank, is evidenced by the letter of March 14th, 1952, which counsel and the Solicitor General received from the American Civil Liberties Union, explaining why they did not make

<sup>4</sup> "1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles. Today On Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy." Case referred to: *Yick Wo v. Hopkins* (118 U. S. 356), 193 F. 2d 306, 311.

application to file as *amicus curiae*.<sup>5</sup> In the instant case it appears that Chin Poy, a stool pigeon, described in the Record by narcotic agent Lee with the euphemism, "special employee" of the Government, went to the combination home and place of business of the petitioner in Hoboken, New Jersey, this being a chinese hand laundry with the store portion in the front of the premises and living quarters in the back rooms of the said premises, and engaged petitioner in conversation. Chin Poy was carrying, according to the testimony of Agent Lee, concealed upon his person, a microphone and radio transmitting equipment (R. pp. 103-4). Agent Lee stationed himself in the vestibule of a building about four doors removed from the petitioner's premises and by means of a radio receiving set working on the same wave length as the transmitter concealed upon the person of Chin Poy, allegedly heard the conversation had between Chin Poy and the petitioner. Agent Lee testified that his receiving set was concealed in a briefcase which he rested upon a radiator in the aforementioned vestibule and that he had in his ear a crystal device which enabled him to hear the broadcast.

He was permitted, over objection of petitioner's trial counsel (R. p. 104) to testify to the conversation he claimed to have heard between Chin Poy and the petitioner on March 30, 1950, approximately six weeks after petitioner's

<sup>5</sup> The body of the letter in question reads as follows:

"Many thanks for your letter of March 4th. We are indeed most pleased that the United States Supreme Court has granted certiorari in this case. The only reason we are not attempting to file a brief *amicus curiae* in support of your position is that we feel that the dissenting opinion below states our feelings so precisely and presents the case so perfectly that there is absolutely nothing we could add in our own brief. You should feel free to quote from this letter in part or in its entirety in your brief or in your oral argument. The case has our full interest.

I am sending a copy of this letter to the Solicitor General."

arrest on February 12th, 1950. His testimony was based upon alleged refreshing of his recollection by notes claimed to have been made by Chin Poy (R. pp. 110-12, 117-18, 120). At one point Agent Lee stated he had lost his own original notes (R. pp. 118, 120-1) and at another point that he had misplaced them (R. pp. 186-7). No excuse or explanation was offered for the failure of the Government to produce Chin Poy at the trial (R. pp. 175-8). Agent Lee testified he attempted to use a recording device to record the conversation between the petitioner and Chin Poy, but the device was not in working order (R. pp. 109-10, 196-7). Petitioner testified that he had known Chin Poy for a number of years, he having been a former employee of petitioner, and that when Chin Poy called at his premises on or about March 30th, he had ordered him therefrom (R. pp. 295-8). He denied having any conversation with the said Chin Poy in respect to the facts of the instant case (R. p. 300).

It is the contention of the petitioner herein and it is respectfully submitted in his behalf, that the entry of the Government special employee upon the combined residence and business premises of the petitioner was a trespass and constituted an unreasonable and illegal search and seizure in violation of the guarantees contained within the Fourth Amendment, and the evidence thus obtained was inadmissible in view of the guarantees contained within the Fifth Amendment.

In the Brief submitted by the Solicitor General in opposition to the Petition for the Writ of Certiorari, it was urged by him that since the conversations objected to took place in petitioner's laundry to which the general public was invited, Chin Poy had entered legally with petitioner's permission and was in the nature of a licensee or invitee. In the absence of any proof to the contrary it is reasonable

to assume that a laundry, similar to the one operated by the petitioner herein in the State of New Jersey, is not regulated by Statute and is not the type of business which the State would regulate and require an owner to deal with and accept business from the general public, regardless of his pleasure or desire, as various State Laws do require in respect to hotels, inkeepers, restaurants and places of amusement. Certainly the petitioner was at liberty to accept or reject the business of any prospective customer and to regulate in his own premises whom might be admitted thereto and permitted to remain thereon and under what circumstances. There can be no dispute that petitioner did not know that Chin Poy was a Government employee and that he had concealed upon his person the microphone and radio transmitter allegedly carried by him.

The Government's brief completely ignored the testimony of petitioner and the comments of the trial court in respect to the visits of Chin Poy to the premises of petitioner. On cross examination concerning the visit of Chin Poy to his premises we find the petitioner testifying as follows:

\* \* \* A. I never said anything like that to him. I never speak to a man that uses drugs and I chased him away from my place.

Q. You say you chased him away? A. Yes, I chased him away" (R. 295).

Shortly thereafter the Court, in commenting upon the visits of Chin Poy to petitioner's premises, said:

"The Court: He came back after that. He was not asked to come back, you used the word 'invite'. He did not make the statement 'come back'. He said that he came back of his own choice. That runs through his testimony" (R. 296).

Further on we find the following testimony of petitioner in respect to the visits of Chin Poy:

"Q. Did you ask him to come over to see you at your laundry in Hoboken? A. Every time I chased him away.

A. I don't remember the exact day. All together he came to my laundry twice and every time I chased him away" (R. 298).

In reading the foregoing testimony of petitioner it must be borne in mind that this was developed upon cross examination by the District Attorney, who was in effect making the petitioner his own witness since it concerned collateral matter which had not been alluded to upon the direct testimony of the petitioner. Despite these statements and denial of petitioner as to invitation either general or express, to Chin Poy to visit him at petitioner's premises, the learned District Attorney did not see fit to produce Chin Poy to contradict the testimony of petitioner and it is respectfully submitted that, therefore, both the District Attorney and the jury were bound by these answers. It is further submitted that if one were to rule that Chin Poy had entered the premises lawfully as a licensee or invitee, because of the public nature of the premises, they must also find that by misusing his license through use of the microphone and radio transmitter he became a trespasser *ab initio*. This rule is embodied and well established in the old English Law.

In Treatise concerning Trespasses, by Carter, published in London in 1705, we find the following:

"If any misuse a license given by the law, he shall be a trespasser *ab initio*. 8 Rep. 146, Six Carpenters' Case."

To quote from an unknown:

"Where the law entry gives  
To abuse it, trespass *ab initio* is."

As recently as 1950 the Appellate Division for the Second Department of the Supreme Court of the State of New York affirmed a conviction for burglary where the defendant was convicted upon the theory that he had entered the premises of a department store, at an hour and time they were open to the public, with the intent of committing the crime of petit larceny by shoplifting and that, therefore, his entry into the premises constituted a breaking and entering for the purpose of committing a crime and that he was a trespasser *ab initio*. See *People v. Sine*, 277 App. Div. 908.

In the case of *Gouled v. United States*, 255 U. S. 298,<sup>6</sup> this Court had occasion to specifically rule and pass upon the question of the admission into evidence, of evidence obtained surreptitiously and by fraud on the part of a Government witness and in that case it was distinctly held that such evidence was obtained by means of an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the evidence was a violation of the Fifth Amendment.

In the *Gouled* case at page 303 the Court said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States*, 232 U. S. 383 and in *Silverthorne Lumber Co. v. United States*, 251 U. S.

<sup>6</sup> In that case a federal employee entered the office of a friend, who was suspected of crime, and while there under the pretense of paying a friendly visit surreptitiously extracted and removed certain papers from the defendant's desk.

385) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these Amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property; that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen, the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over zealous executive officers."

Again at page 305 the Court said:

"It is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion."

The prevailing opinion in the appellate Court below makes much of the fact that the majority opinion of *Olmstead v. United States*, 277 U. S. 438, has never been directly questioned or overruled by this Court. It does, however, admit that in *Goldman v. United States*, 316 U. S. 129, 134, this Court, by dicta, indicated that if the dictaphone which had been placed in the office of one of the defendants by trespass had worked and had been the means of gathering the evidence offered by the Government, such evidence would have been inadmissible.

Where can you find a more clear cut instance of evidence being obtained by trespass than in the instant case? Here we have Chin Poy, with a radio transmitter concealed upon his person, in the premises of the petitioner. In the Goldman case we had a dictaphone physically placed upon the premises. In both cases we had a direct crossing of the threshold of the defendant by Government employees armed with instruments that would cause and permit other Government employees to, for all practical purposes, to accomplish the same as if they had secreted themselves physically upon the premises of the defendant.

Even if this Court were to hold at present that there was no disposition on their part to overrule the decision in *Olmstead v. United States*, cited *supra*, the distinction between the instant case and the *Olmstead* case is so marked that a ruling might well be made here in favor of petitioner without destroying the effect of or specifically overruling the *Olmstead* decision.

Chief Justice Taft in his opinion took occasion at five specific instances to point out there had been no intrusion, invasion, or trespass upon the physical premises of the defendant. He took pains to set this forth at page 457 of his opinion,<sup>7</sup> at the top of 464<sup>8</sup> of his opinion in discussing *Gouled v. United States* (cited *supra*), at the bottom of page 464,<sup>9</sup> and twice on page 466.<sup>10</sup>

<sup>7</sup> "The insertions were made without trespass upon any property of the defendants \* \* \* the taps from house lines were made in the streets near the houses".

<sup>8</sup> "There was actual entrance into the private quarters of defendant". Referring to *Gouled v. United States*.

<sup>9</sup> "There was no entry of the houses or offices of the defendants".

<sup>10</sup> "Here those who intercepted the projected voices were not in the house of either party to the conversation".

"\* \* \* or an actual physical invasion of his house, or 'curtilage' for the purpose of making a seizure."

In the Solicitor General's brief in the *Olmstead* case, he pointed out to the Court that there had been no intrusion upon the premises of the defendants and at page 41, in discussing the provisions contained within the Fourth Amendment, said:

" \* \* \* but clearly the constitution does not forbid it unless it involves actual unlawful entry into a house."

### **The Time is Ripe for This Honorable Court to Overrule its Holding in the *Olmstead* Case.**

Aside from any distinction between the *Olmstead* case and the instant case it is respectfully submitted that present day conditions require this Honorable Court to overrule its prior holding. Modern science and its many inventions have created a world non-existent at the time of the adoption of the Fourth Amendment of our Constitution. The reasons for the adoption hold as good today as they did in the time of our forefathers. While it is true that today we worry not about "Writs of Assistance" the fundamental underlying principle of a freedom loving people remains the same. The decisions of this Court are replete with the expressions of opinion by the Learned Judges who preceded us to the effect that our Constitution and its Amendments and the interpretation of same are elastic and must be viewed in the light of the conditions that exist at the time a particular question is presented. This was very ably expressed in the opinion of this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) at 387:-

" \* \* \* While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and dif-

ferent conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

As early as 1886, this Court in deciding nice distinctions offered by the Government as excuses for violation of a defendant's rights under the Fourth Amendment where in lieu of an illegal search and seizure a defendant was directed by Court Order to produce his books and records, the Court in *Boyd v. United States*, 116 U. S. 616, held that this was mere subterfuge to avoid the safeguards established by our Constitution and its Amendments, and said at page 635:

"It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

One of the earliest cases involving interpretation of citizen's rights under the Fourth Amendment is *ex parte Jackson*, decided in 1877, 96 U. S. 727. This concerned the right to privacy and against inspection by postal authorities of letters and packages properly sealed and mailed. At page 733 the decision of this Court held:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outside form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be

secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection wherever they may be."

If we are to continue to follow the doctrine asserted in the *Olmstead* case, namely, that the government may by use of finely shaded distinctions and devices circumvent the purpose and intent of the Fourth Amendment then the safeguards granted one under the Fourth Amendment and as interpreted by this Honorable Court in *Ex Parte Jackson* and the other cases becomes a nullity.

With the aid of modern science it is both conceivable and probable that Government employees and agencies might, through the use of fluoroscope or x-ray, be able to extract the very contents of a sealed letter or package without disturbing the seal contained thereon. To what avail would the words of the Fourth Amendment of the Constitution and of this Honorable Court, as expressed in *Ex Parte Jackson*, be to one whose letters or packages were so inspected and the contents thereof ascertained unless this Court is prepared, at this time, to say that the Courts have kept step with scientific developments and will still protect the principles and sustain the guarantees contained within the Fourth Amendment.

Since the decision in the *Olmstead* case, great strides have been made in the field of science concerning the use of electronic devices. This Court observed in the *Goldman* case, cited *supra*, that it is possible for Government agents to overhear and listen to one side of a telephonic conversation by the use of an induction coil, described therein as a "detectaphone". In fact, if the induction coil had been placed in a strategic position adjacent to the telephone wires, both sides of the conversation would have been overheard and yet there might not have been any violation of the prohibitions contained within §605, Title 47, U. S. C.,

the Federal Communications Act. It is now possible to place an induction coil or similar device near telephone lines at a distance from the office or home containing the telephone instrument and by use of another electronic device cause the conversation picked up by the induction coil to be broadcast shortwave to a person or persons situated some distance away from the original point of the use of the induction coil. Adherence to the majority opinion in the *Olmstead* case must, of necessity, lead to the circumvention of the provisions of the Federal Communications Act and the emasculation of the constitutional guarantees contained within the Fourth Amendment.

At the time the *Goldman* case was decided two of the Judges of this Court stated, in a memorandum opinion, that they were then prepared to overrule the rulings of the *Olmstead* case. The exact language of Chief Justice Stone and Mr. Justice Frankfurter appears at page 136 and is as follows:

"Had a majority of the Court been willing at this time to overrule the *Olmstead* case we should have been happy to join them. But as they have declined to do so and as we think this case is indistinguishable in principle from *Olmstead's*, we have no occasion to repeat here the dissenting views in that case with which we agree."

In fact, the Solicitor General conceded at page 27 of his brief submitted in opposition in the *Goldman* case that the Constitution was not to be read with literal exactness and described it as a

"living document for all times."

He further described the intent of the Fourth Amendment as being to protect the citizens against forms of abuses of the investigatory powers of the Government.

Again in *Byars v. United States*, 273 U. S. 28 (1926), at 33, this Court ruled that the Courts must not sanction the use of equivocal methods which might seem to escape the challenge of illegality. The exact words of the Court appearing at page 33 were as follows:

"The Fourth Amendment was adopted in view of a long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurances against any revival of it so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially may seem to escape the challenge of illegality, but which in reality strike at the substance of the constitutional right."

In the minds of the general public and the daily press, especially as evidenced by the comic strips, wrongdoers are constantly adapting the instruments of modern science to their nefarious trades. A reader of the decisions emanating from this Honorable Court and an observer of the criminal trials held under Federal jurisdictions, however, must come to the conclusion that once this Court or any of the lower Federal Courts condemn a method or instrument used by federal investigatory agents as being in violation of a person's Constitutional rights, the said investigatory agencies are ready to jump into the breach with a new and more subtle method and means of attempting to circumvent and nullify the effects of rights granted under the Fourth and Fifth Amendments of our great Constitution and the interpretations placed upon the said Amendments by this Honorable Court.

The Courts of this country and particularly this Honorable Court, have repeatedly found it necessary to curtail the activities of law-enforcement agencies and particularly

the means and methods used to gather evidence. In fact, in *United States v. Trupiano*, 334 U. S. 369, a case cited and approved in the majority opinion in the Court of Appeals below, this Court pointed out that it was still necessary for the Courts to lay down, and enforce the rules concerning the gathering of evidence.<sup>11</sup>

The decisions of this Court and the Court below are replete with the fact that no distinction is to be made between search and seizure of a home or of a man's place of business.<sup>12</sup>

Chief Justice Swan's opinion below stresses the fact that there was nothing tangible seized or obtained in the instant case and urges that the Fourth Amendment of the Constitution intended solely to provide for the search of a place or the person and the seizure of tangible things.

<sup>11</sup> This Court said at 705:

"In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed".

Petitioner submits that in his case it is highly significant that the evidence complained of was not obtained under the circumstances outlined in the *Trupiano* case, there being no "excitement of the capture" of a suspected person. The petitioner complains of act of the Government's agents taking place over 6 weeks after the arrest of the petitioner and being committed with deliberation and in apparent desire to bolster what must have appeared to even the most biased federal employee to be, to say the least, an extremely weak and unsustainable case against the petitioner. Continuing, this Court said in the *Trupiano* case:

"To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

<sup>12</sup> *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Gould v. United States*, cited *supra*; *Go Bart Co. v. United States*, 282 U. S. 344; *United States v. Lefkowitz*, 285 U. S. 452.

Apparently the inherent weakness of this argument was realized and appreciated by the Solicitor General in preparing his Brief in opposition in the *Goldman* case, cited *supra*, for at page 25 of his Brief the Solicitor General said:

“ \* \* \* accordingly the court has struck down as in violation of the Amendment every attempt, in whatever guise, either physically to invade the home or office or to seize any detachable property or effects.”

This argument is particularly disturbing and unappealing to a practicing lawyer or doctor since all people engaged in the professions have, at some time or other, and unfortunately all too often, “had their brains picked”, by a perfectly respectable friend or acquaintance. This friend or acquaintance would never give thought, secretly or publicly, to picking the pocket of anyone or stealing the wares of a merchant, but often has not hesitated to steal and take the stock in trade of his professional friend or acquaintance by seeking and obtaining advice with no intent to pay for same. Who can say that the ideas of a man or his words and every thought are not his secret property the same as his watch, pocketbook or papers. If we were to carry this to its logical conclusion it can be conceived that a Government agent under the circumstances and conditions existing in the instant case, might carry on a conversation with a mute who could not answer but would write out his replies and then we would have federal narcotic Agent Lee testifying to what he heard over the radio, namely the question or statements propounded by Chin Poy and producing and introducing into evidence the written replies made and given to Chin Poy

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\* Emphasis supplied.

by the mute. Can one say that under such circumstances that it would be permissible for Agent Lee to testify as to the oral statements made by Chin Poy, but that the written replies would be inadmissible into evidence because it was obtained by illegal search and seizure and something tangible or physical had been carried away as a result of that illegal search and seizure. Suppose one called at the office of a friend who had in his house a wire recording or dictaphone recording device, and that this device was secretly placed in operation by the caller while a conversation was being held between the two and that the caller then surreptitiously purloined the reel of wire or the record cut by the dictaphone. Would this evidence be inadmissible because the physical evidence of the spoken word had been obtained in violation of the Fourth Amendment or should it not be rejected from evidence because the very spoken word itself had been obtained in violation of the Fourth Amendment?

The prevailing opinion below and the Brief submitted by the Solicitor General in opposition to the application for a Writ of Certiorari, cite with approval the case of *Davis v. United States*, 378 U. S. 582 as authority for the admissibility of evidence if obtained by subterfuge. A careful reading of this decision discloses that there was no subterfuge on the part of the Government agents and the evidence obtained was due to the invitation of the defendant to any and all persons including the general public to join with him in breaking the Law of the United States. The case of *United States v. Trupiano* (cited *supra*), is also cited in the prevailing opinion for authority that subterfuge is not a trespass. The distinctions between these cases and the instant case are so clearly set forth in the dissenting opinion of Frank, C.J. (193 F (2d) 311), that to belabor them further in this Brief would serve no purpose.

This Court only recently condemned surreptitious entry into a premises. In *United States v. Jesse Jeffers Jr.*, 342 U. S., the prevailing opinion of the Court said in discussing the entry by officers to make a search for the sole purpose of seizing contraband:

“ \* \* \* the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted *surreptitiously* and by means denounced as criminal.” (Emphasis supplied.)<sup>13</sup>

If the ruling in the instant case is permitted to stand no one will be safe in talking to a friend, acquaintance or business associate, no matter where such conversation might take place and particularly if it takes place within his home or place of business, unless and until he has conducted a thorough and complete investigation and search of the person of the party with whom he is conducting the conversation, or in police parlance, he has “frisked” the individual. If because of modern science we are to live under the constant threat of having our words and very thoughts broadcast to the world or to individuals we do not even know, then our theory of the inherent right of

<sup>13</sup> A very interesting theory is presented by footnote 7 of the dissenting opinion of Murphy, *J.* in *Goldman v. United States*, 316 U. S. 129 at 140:

“A warrant can be devised which would permit the use of a detectaphone, cf. Article 1 §12 of the New York Constitution (1938). And while a search warrant with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies (see *Agnello v. United States*, 269 U. S. 20, 32), some method of responsible supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusion by Government officers. (See Wigmore, *Evidence*, 3rd Ed. Vol. 8, §2184b, pp. 51-2.)

every member of our society in these United States to liberty becomes a mockery and travesty and mere cant.

It was suggested in the Brief submitted in opposition to the application for Certiorari that petitioner could not now be heard to protest concerning violation of his constitutional rights because not only were there two conversations held in the combined home and place of business of petitioner between him and the Government employee, Chin Poy, but also there ~~was~~ one conversation allegedly held on a public street in the City of New York and that in all three conversations the radio device complained of was used.

A careful reading of the Record discloses that this argument is fallacious and due to improper interpretation of the Record. Reference was made to pages 113 and 114 of the Record.

A careful reading of these pages discloses that the only time in his testimony that Agent Lee claimed petitioner had made an admission or referred to the transaction resulting in his arrest was at the first meeting between Chin Poy and the petitioner held in the petitioner's combined home and place of business.

When Agent Lee commenced testifying concerning the second alleged overheard conversation, which it is claimed took place on a street in New York City, we find objection being made by trial counsel and the following appears in the Record:

"Mr. Rosenthal: The second conversation is not claimed, I do not believe, to have anything to do with the transaction charged in this indictment.

The Court: I understand that" (R. 113-4).

It is, therefore, respectfully submitted that it is apparent that even if it were to be believed that the petitioner made

an admission on the street to Chin Poy that he was an agent for a syndicate, it did not in any manner refer to the transaction of January 22nd, 1950, which was the basis of the arrest and prosecution and no verdict of the jury could be claimed to be predicated upon this testimony.

Judicial approval of the conduct of the federal employees in the instant case can only produce repeated and worse offenses of this nature.

The dissenting opinion of Frank, C.J., quotes at length from Orwell's "1984" and also cites references at length to the conditions existing within Nazi Germany when and where society had what is tantamount to thought control. The actions of the Government agents and employees in this case is what we hear as now occurring in those Countries beyond the "Iron Curtain" and certainly do not conform to the concepts within this Country of those

"certain inalienable rights, that among these are life, liberty and the pursuit of happiness",

with which the second paragraph of our Declaration of Independence informs the world all men are endowed.

In *Neuslein v. District of Columbia*, 115 Fed. (2d) 699, Chief Justice Vinson, then a Circuit Judge, writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while upon the said premises obtained certain evidence through their power of observation and hearing while questioning the defendant, they had, in his opinion, conducted an illegal search and seizure. He said in part,

"The crucial thing 'found' in this 'search', was a declaration of fact by the defendant that has become decidedly incriminating. \* \* \* The Fourth and Fifth Amendments relate to different issues, but cases can

present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by unlawfully coming into his home and by placing him in custody. \* \* \* But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right."

The prevailing opinion in the Court of Appeals attempts to distinguish the instant case from the *Neuslein* case, because of the fact that here the entry was through subterfuge and there it was a direct trespass. In view of the decisions in *Gouled v. United States* and *United States v. Jesse Jeffers Jr.*, both cited *supra*, it is respectfully submitted that there is no distinction between entrance made through trespass or by fraud and subterfuge and that in either or both cases a trespass in violation of the Fourth Amendment is committed.

(b) The evidence of the conversations between Chin Poy and petitioner having been obtained by means and use of radio were obtained in violation of §605, Title 47 U. S. C. and, therefore, inadmissible.

Prior to the decision in *Olmstead v. United States*, there was upon the Statute books a Law commonly known as "The Radio Act".<sup>14</sup> Subsequent to the decision in

<sup>14</sup> Chapter 169, §27, Laws of 1927:

No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination or to proper accounting or distributing offices of the various communication centers over which the radio communication may be passed, or to a master

*Olmstead v. United States* and its ruling that the tapping of telephone wires and obtaining the conversations was legal and the evidence thus obtained admissible and not in violation of the Fourth Amendment, Congress passed what is known as the Federal Communications Act and by §605 of Title 47 U. S. C. made the interception or disclosure of messages transmitted by radio, telephone, or telegraph illegal.<sup>15</sup>

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of a ship under which he is serving, or in response to a Subpoena issued by a Court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any persons and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof and knowing that such information was so obtained shall divulge or publish the contents, substance, purport, effect, or meaning thereof, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; provided that this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

<sup>15</sup> §605. Unauthorized publication or use of communications:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, con-

The Federal Communications Act closely parallels and incorporates most of the provisions of the former Radio Act. The prevailing opinion of the Court below dismissed as not sustainable the contention that the disclosure of the evidence overheard by means of radio by Agent Lee was forbidden by the Federal Communications Act. It quoted from the decision of this Court in *Goldman v. United States*, cited *supra*<sup>16</sup> and the Court found that there was no "interception" of a communication, the radio being used merely as a mechanical means of eavesdropping. By the very nature of radio you have a different condition presented in respect to interception than exists in telephone or telegraph wires. There cannot be and there is not in an interception of a radio broadcast the introduction of any mechanical device between the point of transmission and the point of interception. The very use of the transmitter causes the conversation to be broadcast upon the ether waves and anyone with a receiving set tuned to the

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tents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, ch. 652, §605, 48 Stat. 1103.)

<sup>16</sup> The protection intended and afforded by the Statute is of the means of communication and not of the secrecy of the conversation (316 U. S. 129, 133).

same wave length as the transmitter will receive the message even though it also is received at some other point by the intended recipient. The Radio Act and the Federal Communications Act both provide that no person shall either receive or use any information contained within a message for his own benefit or for the benefit of another not entitled thereto or having become acquainted with the contents of any message, divulge the same without the consent of the senders. In the instant case the petitioner never wittingly or knowingly broadcasted to Agent Lee so that it cannot be contended that federal narcotic Agent Lee was a proper recipient of any radio message from the petitioner nor did the petitioner at any time consent to the disclosure by Agent Lee of his broadcast although it is probably properly assumed that Chin Poy did so consent by the very use of the transmitter.<sup>17</sup> There is here, as was pointed out by the Circuit Court of Appeals for the Second Circuit, in the case of *United States v. Polakoff*, 112 Fed. (2d) 888, two senders and, therefore, interception or disclosure of the broadcast without the consent of the petitioner could not be held to be authorized under the exceptions contained within the Federal Communications Act.

- (c) **The inherent power of this Honorable Court to formulate rules of evidence in federal criminal trials guided by consideration of justice should cause the rejection of evidence obtained in the manner and by the devices used in the obtaining of evidence of the conversations had by Chin Poy and the petitioner.**

This Court has ruled in *McNabb v. United States*, 318 U. S. 332 that in the interest of justice this Court can and should reject evidence improperly obtained by Federal officers, the Court stated at 341:

<sup>17</sup> The Record is barren of any statement as to his consent.

"The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal Courts, see *Nardone v. United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions \* \* \* and in formulating such rules of evidence for federal criminal trials *the Court has been guided by consideration of justice not limited to the strict canons of evidentiary relevance.*"<sup>18</sup>

If this Honorable Court is of the opinion that the evidence in question was not obtained in violation of the petitioner's constitutional rights or in violation of the provisions of §605 of Title 47 U. S. C., could there be a more proper place for this Court to state and exercise what it has classified as its inherent right to formulate rules of criminal evidence and to direct the rejection of the evidence in the instant case and in the future all evidence obtained by the means and method employed by the Government in this case.

There can be no argument in opposition to the theory that if this Honorable Court finds that the evidence in question was obtained by the Government in violation of the terms of the Fourth Amendment, then of necessity it follows the introduction into evidence was a violation of the petitioner's rights under the Fifth Amendment of the Constitution.

Going one step further it is urged by petitioner that regardless of the ruling that might be made on the question

<sup>18</sup> Emphasis supplied.

of whether this evidence was obtained contra to the Fourth Amendment in permitting of a third party, a Government agent, to testify to the hearsay of the alleged overheard conversation between the petitioner and the Government employee, Chin Roy, this evidence in effect made the petitioner, the defendant in the Court below, an unwitting and unwilling witness against himself. While it is true that he was not belabored with a baseball bat or forced at the point of a gun the fact remains that by the use of the walkie talkie radio, he was compelled to broadcast involuntarily a statement and thus it was possible for Government Agent Lee to testify as to what he claimed to have heard the petitioner, the defendant below, to have said. This, just as surely as if the statement had been extracted by force, compelled the defendant to testify against himself. In *Gould v. United States*, 255 U. S. 298, at 306, the Court said:

"In practice the result is the same to one accused of crime, whether he be obliged to supply evidences against himself or whether such evidence be obtained by an alleged search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

Again in *Weeks v. United States*, 232 U. S. 383 (1914), the Court said at 391:

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizure and enforced confession, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgment of the courts which are charged

at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Particularly pertinent is the opinion of Mr. Justice Bradley, appearing at page 631 in *Boyd v. United States*, 116 U. S. 616 (1885):

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free Government. It is abhorrent to the instincts of an Englishman; and it is abhorrent to the instincts of an American. It might suit the purposes of a despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

For the most recent judicial expression concerning the use of subterfuge in lieu of force in attempting to extract an admission or confession see *People v. Leyra*, 302 N. Y. 353.

## POINT II

**The admission into evidence of the accusatory statement made by co-defendant, Gong Len Ying, subsequent to arrest, was serious error prejudicial to petitioner.**

The petitioner respectfully submits that serious and prejudicial error was committed by the Trial Court in permitting to be introduced into evidence, over the objection of the petitioner, statements alleged to have been

made by the co-defendant Ying in the presence and hearing of the defendant.

The District Attorney elicited from Government witness Detective Monahan, that he had questioned the petitioner and the co-defendant separately and that at that time the petitioner had denied any connection with the co-defendant or any participation in the sale of opium to or with the co-defendant (R. p. 73). There had been previous testimony in the case by Narcotic Agent Gim that the petitioner was asked whether or not he had given or sold a pound of opium to Ying and that he had said no (R. pp. 53, 63).

Detective Monahan then testified:

"When I got there I put the two of them in one room and I asked the truck driver Gong where he got the opium on January 22nd that he sold to Agent Gim.

The Court: What did he say?" (R. p. 73).

At this point the attorney for the petitioner objected to the question of the Court and the Court replied that it being a statement in the presence and hearing of petitioner it was admissible. The Court proceeded to examine the witness, Detective Monahan, in detail as appears at pages 74 and 75 of the Record. Counsel then asked for a direction from the Court to the jury to disregard the conversation had with Ying after his arrest, and discussion then took place between the Court and counsel from pages 75 to 80 of the Record. During this discussion in the presence and hearing of the jury the Court expressed the opinion that the failure of a co-defendant on a conspiracy charge to deny the accusatory admission made by another defendant after arrest might be considered by the jury as an admission (R. p. 78). The various statements made by the Court during the discussion in the presence and hearing of the jury could leave the jury with no impression other than

that the alleged admission made by Ying in the presence and hearing of the petitioner was good and binding evidence against the petitioner.

All of this took place on the very first morning of the trial and was constantly referred to and discussed subsequently during the trial, both in and out of the hearing and presence of the jury, by the Court, counsel for the petitioner and the District Attorney.

At page 90 of the Record it appears that Detective Monahan testified that the appellant always denied having any part in the transaction of the sale of the pound of opium in question. Again through Agent Lee, an effort was made to introduce the accusatory statement and admission made by the co-defendant Ying although it appeared affirmatively that the petitioner had denied that the opium in question was his (R. pp. 102-3).

It becomes apparent how important this point was and how it must have been magnified in the eyes of the trial jury when we realize that at the conclusion of the first day of the trial and again in the presence and hearing of the jury, the Trial Court, out of a clear sky, when discussing the adjournment for the day, stated:

"The Court: I can give you the citations on admission by acquiescence" (R. p. 136).

On the morning of the second day of the trial at the opening of Court, the attorney for the petitioner proceeded to move to strike from the evidence the testimony which had been given concerning the admission claimed to have been made by Ying after arrest and offered the Court citations and quotations from various Federal cases. Suddenly, the Court decided that no further argument on the subject should be held in the presence of the jury and deferred argument until later in the case (R. pp. 137-39).

Although the District Attorney insisted that he had not offered this evidence as proof of an admission on the part of the petitioner he never lost an opportunity during the trial of trying to get same before the trial jury. At page 217 of the Record it appears that he asked the co-defendant Ying the following question, which he subsequently withdrew when objected to by the petitioner's attorney:

"Q. Did somebody ask you where you obtained the opium that you gave Agent Gim?"

Again at page 219 he pursued the same question in a different form and the Court again engaged in a lengthy colloquy with counsel for petitioner. Pages 219 to 222 of the Record are concerned with the discussion had in the presence of the jury. Counsel for petitioner furnished the Court again with the citations which had previously been given on the morning of the second day of the trial. The remarks of the Court were highly prejudicial to the petitioner, some of the worst being as follows:

"The Court: I am not talking before arrest or after arrest; I am talking about whether a case where a defendant did not open his mouth, whether that could be used against him.

Mr. Rosenthal: They all say he does not have to open his mouth after arrest and that no inference can be drawn from that.

The Court: Some say that and some say to the contrary. \* \* \*

The Court: It would be the natural impulse of a man to contradict" (R. p. 222).

At the conclusion of the government's case the attorney for petitioner again moved in respect to the admission of this evidence and further moved for a withdrawal of a

juror and a declaration of a mistrial. It is respectfully submitted that a motion for a mistrial should have, at that time, been granted since it should have been crystal clear to the Trial Court that serious prejudicial error had been committed by it, by the admission of the testimony in question and that nothing that would thereafter be done or said by the Trial Court or anyone else could possibly cure it. This point had been stressed to such an extent during the trial by the remarks referred to above by the Court, that the only result that could reasonably be expected was that the trial jury would believe that the failure of the petitioner to deny the accusatory statement of Ying was tantamount to an admission by the petitioner of the truthfulness of that statement.

Apparently the District Attorney knew that serious error had been committed and made no effort to justify the admission of this evidence by citation of any cases in support of the Court's theory. In fact, when the Judge asked him point blank for any supporting citations he attempted to evade and avoid the issue as appears from the following:

"The Court: You looked it up? You read it? You may read it a different way. What is your best case on it?

Mr. Martin: My position, Judge, is that we don't rely on that part of the testimony.

The Court: I don't care whether you do or not, I am trying the case according to my knowledge of how it should be tried. Why don't you rely on it? Because you think it's wrong? Now, speak up.

Mr. Martin: No, Judge.

The Court: If you introduced it in evidence why was it introduced if it does not amount to anything, what was the idea of it?

Mr. Martin: I did not want to withhold anything from the jury, I merely stated what occurred without asking the jury to draw any inference" (R. p. 254).

It is respectfully submitted that the Court erred in its rulings in respect to the admission and weight of the aforementioned evidence. The following cases all hold that no derogatory inference may be drawn from failure to deny an accusatory statement:

*McCarthy v. U. S.*, decided in the 6th Circuit, 25 Fed. 2nd 298;

*Yep v. U. S.*, 83 Fed. 2nd 41;

*Skiskowski v. U. S.*, 158 Fed. 2nd 177;

*People v. Rutigilano*, 261 N. Y. 103;

*U. S. v. Lo Biondo*, 135 Fed. 2nd 130 (decided in 2nd Circuit 4-22-43).

In *McCarthy v. U. S.*, cited and quoted in the *Lo Biondo* case, cited *supra*, the Court said at 299:

"To draw a derogatory inference from mere silence is to compel the defendant to testify and the customary form of warning should be changed and the respondent should be told 'If you say anything, it will be used against you, if you do not say anything, that will be used against you'."

In *Yep v. U. S.*, cited *supra*, the Court at page 43 had this to say in respect to the silence of the defendant when the accusatory statements were made in his presence and hearing:

"At the time of the conversation between Finnis and Esther Haugh, Yep was under arrest.

When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he is charged; and statements tending to implicate him made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him."

The majority opinion of Swan, *Ch.J.*, of the Court of Appeals, held that while the admission into evidence of the accusatory statement made by petitioner's co-defendant after arrest was erroneous (R. p. 164), the error had been cured by the charge of the Court and the petitioner was in no manner prejudiced. Contrast this with the opinion of Swan, *Ch.J.*, then *C.J.*, in *United States v. Corrigan, et al.*, 188 F. (2d) 641, in which case although the Court unanimously concluded that the evidence of the guilt as disclosed in the Record was overwhelming, reversal was required because of the erroneous admission of two exhibits which reflected on Corrigan's integrity. In his opinion Chief Justice Swan, then Circuit Judge, said at page 645:

"Whether in fact the reports influenced the jury's verdict is, of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

The majority opinion of the Appellate Court below offers also an interesting contrast to that by its former Chief Justice Learned Hand in the case of *Skidmore v. Baltimore & Ohio R. Co.*, 167 Fed. (2nd) 54. In the instant case the prevailing opinion states:

"The jury system is premised on the assumption that when the Judge instructs the jury what evidence

it may consider it will obey the instruction" (R. p. 413).

Judge Learned Hand in a lengthy decision discussing generally the effect of the jury system on our jurisprudence said, in *Skidmore v. Baltimore & Ohio R. Co.*, cited *supra*, at page 64:

"The theory of the general verdict involves the assumption that the jury fully comprehends the Judge's instruction concerning the applicable substantive legal rules, yet often the Judge must state those rules to the jury with such niceties that many lawyers do not comprehend them and it is impossible that the jury can."<sup>19</sup>

As pointed out by Judge Frank in the dissenting opinion below, such error could be considered harmless, if at all, only where the Government had proven an extremely strong case, but that in the instant case the evidence and testimony concerning the guilt of petitioner was, to say the least, weak.

This Court in *Kotteakos v. United States*, 328 U. S. 750, in discussing so called "harmless" error, said at page 764:

"And the question is not, were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or may reasonably be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

<sup>19</sup> At page 65, footnote 25d, Judge Hand discusses the fact that appellate Courts are prone to hold so-called "procedural" errors harmless although they all too often probably and undoubtedly influence the verdict of the jury.

And again at page 765 this Court said:

"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one ~~is~~ left in grave doubt, the conviction cannot stand."

The disturbing feature in the instant case is that the majority opinion in the Appellate Court below totally ignores the fact that the Trial Judge in attempting to correct and cure the error complained of unquestionably harmed the petitioner even greater than the original admission of the evidence had done. He misquoted and misstated the evidence and the rule of evidence. In charging on the point in question, which charge was apparently delivered as an afterthought and not as a part of the main charge, the Trial Judge twice informed the jury that the accusatory statement of the co-defendant was not binding upon the petitioner only if petitioner had denied *before arrest*, the facts contained within the accusatory statement made subsequent to arrest.<sup>20</sup>

<sup>20</sup> "The Court: \* \* \* I will charge the jury that *if before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest, in the presence of Monahan and possibly some of the other agents was told or heard Gong saying, 'You gave it to me; you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so" (R. pp. 360-1). (Emphasis supplied.)

\* \* \* Now, I modify that by this consideration: *if before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would

Sandwiched in between these incorrect and erroneous statements concerning the facts in the case<sup>21</sup> there is also an equally incorrect charge and statement concerning the Law.<sup>22</sup>

Analysis of this erroneous statement of fact and of law contained within the Court's Charge, placed a burden that did not exist within the four walls of this case and Record. Being unable to find, because none existed, any evidence that the defendant had entered a denial before his arrest, the jury was left with no choice but to follow the Court's erroneous expression of law appearing at Footnote "20" of the within brief and at page 362 of the Record, namely, that the petitioner's failure to deny the accusatory statement made by co-defendant Ying in his presence and hearing, was evidence of acquiescence in its truth.

The only case cited by the Government in its Brief in the Appellate Court below which would seem to hold contra to *United States v. Lo Biendo, Yep v. United States* and the various other cases cited *supra* as authority for the fact that a defendant after arrest is under no compulsion to affirm or deny an accusatory statement made by a co-

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say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient" (R. pp. 361-2).

<sup>21</sup> There is no proof in the Record of a denial by petitioner prior to arrest. The evidence in the Record discloses without question that there was a denial by petitioner, *subsequent* to arrest but prior to the accusatory statement of the co-defendant.

<sup>22</sup> " \* \* \* The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth" (R. p. 362).

defendant, and that no inference can be drawn by his failure to do so is the case of *Sparf and Hansen v. United States*, 156 U. S. 51. It is not clear from a reading of the opinion in that case as to whether or not the accusatory statement was made subsequent to actual arrest or during the course of an investigation concerning the circumstances of the commission of the crime charged and leading up to the actual arrest.

### CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

GILBERT S. ROSENTHAL

HENRY K. CHAPMAN

*Attorneys for Petitioner*

FILED  
APR 24 1952

CHARLES E. LEE  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1951

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No. 543  
\_\_\_\_\_

ON LEE,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**PETITIONER'S REPLY BRIEF**  
\_\_\_\_\_

GILBERT S. ROSENTHAL

HENRY K. CHAPMAN

*Attorneys for Petitioner*

New York City, N. Y.

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**PETITIONER'S REPLY BRIEF**

The Government's brief in opposition contains many misstatements of fact and misinterpretations of the law which petitioner believes should not be permitted to go unchallenged. They will be discussed in chronological order as they appear in the Government's brief.

At footnote 8 appearing at page 10\* an attempt is made to describe to the Court the manner in which Chin Poy, the special government employee, carried concealed upon his person a radio-transmitter and the method used to operate it. This is totally unsupported by the record and must of necessity consist of guess work on the part of the

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\* References are to pages of Government's brief unless otherwise designated.

writers of the Government's brief, for the record reference referred to in the brief is the description given by Agent Gim of the particular radio transmitter carried and used by him.

It is highly significant that in the present state of the record, due to the failure of the Government to produce or call as a witness Chin Poy, there is absolutely no proof that Chin Poy ever turned on any switch so that his radio transmitter would work.

At page 11 the brief again attempts to do what the Government did in its original brief in opposition to the petition for certiorari in that it relates that Agent Lee testified to an admission supposedly made by petitioner, subsequent to arrest, to Chin Poy on April 2, 1950 on the sidewalk in front of 35 Mott Street.

As is also pointed out in petitioner's main brief a close reading of the record discloses that the conversation allegedly held on April 2nd on the sidewalk did not in any manner refer to the transaction of January 22, 1950 (34). A further reading of the record at page 185 discloses that Agent Lee admitted upon cross examination that his entire direct testimony, concerning conversations allegedly held between Chin Poy and the petitioner, referred only to the conversation of March 30, 1950 which was one of the conversations held in petitioner's combined home and place of business.

In their Summary of Argument and throughout their brief the Government claims "that there was no entry by the use of fraud, stealth or duress". This contention first appears at page 12 of the brief and is repeated frequently thereafter. How the Government can hope to support this contention is not apparent since the record discloses that

the very nature of the equipment used by Chin Poy and Agent Lee, the short wave radio transmitter and receiver, depended for its success upon the entry of Chin Poy upon said premises in the guise of a friend, and without disclosure of the fact that he had concealed upon his person the radio transmitter in question. If this were not an "entry by the use of fraud and stealth" then the writer cannot conceive of any situation which would constitute such an entry. In *Gouled v. The United States*, 255 U. S. 298, this court held that where a soldier, friendly with the defendant Gouled, in fact a former employee just as Chin Poy was of the petitioner, called upon Gouled in the guise of a friendly visit but really with the intent and for the purpose of obtaining evidence, if possible; his entry into the office of the defendant in that case was accomplished by stealth and fraud and consisted of a surreptitious entry thus constituting an entry by trespass upon the premises of the defendant in question. All of the cases decided by this Honorable Court have held this to be repugnant to the safeguards granted by the Fourth Amendment.

In part II of the Government's Summary of Argument and again in Point II in the argument contained in the Government's brief an attempt is made to confuse the issue involved by repeatedly referring to and describing the radio transmitter used in the instant case as a "mechanical listening device" and ignoring the fact that the instruments were actually a mobile radio transmitting set and a radio receiving set. These are described at length under the various sections of Title 47, U. S. C. This will be discussed at greater length herein in replying to Point II of Government's argument.

## Reply to Argument

Both in its brief in opposition to the original petition and in its present brief the Government has raised the contention that petitioner did not object in the court below to the introduction into evidence of the testimony now claimed to have been obtained in violation of the Fourth and Fifth Amendments. For reasons best known to the Government's counsel they have seen fit in both briefs to ignore the fact that at page 104 of the record there is noted a general objection to this evidence made by counsel for the petitioner in the trial court.

While it is true petitioner made no preliminary motions to suppress the evidence in question the reason for same is obvious. The evidence having been obtained surreptitiously by fraud and stealth petitioner could not be expected to have any knowledge of its existence until it was actually offered at the trial. The various cases cited by the Government in footnote 9 of its brief concerned themselves with factual situations where the defendant in question in each instance had more than ample notice prior to trial of the illegal search and seizure. As for example in the case of *United States v. Rabinowitz*, 339 U.S. 56, 63 we find the defendant, a stamp dealer arrested under a legal warrant and coupled with a debatable search (although it was believed by this court to be a legal one), conducted in his presence.

In *Segurola v. U. S.*, 275 U. S. 106, the possibly objectionable evidence was offered and received into evidence without any objection whatsoever being made on the part of the defendant on trial nor was there any denial of the testimony of the Government's witnesses by the defendants on trial. In the instant case we have a complete denial by petitioner.

In *United States v. Di Re*, 332 U. S. 581 this Honorable Court in its consideration of the question of illegal arrest and subsequent search and seizure proceeded to discuss among its members a section of the Penal Law of the State of New York which had not been urged in either the court below or even before the Supreme Court.

The Government totally ignores the case of *Gould v. The United States*, *supra*, which held that the objection is not made too late if made upon notice of the existence of the evidence in question.

In *United States v. Rabinowitz*, 339 U. S. 56, Mr. Justice Black of this Court in his concurring opinion advances the theory that the Federal Exclusionary rule is not commanded by the Fourth Amendment but is a judicially created rule of evidence. He stated at page 66:

"*Trupiano v. United States*, 334 U. S. 699, was decided on the unarticulated premise that the Fourth Amendment of itself barred the point of Evidence Obtained by what the Court considered an 'unreasonable' search. I dissented in that case. Later concurring in *Wolf v. Colorado*, 338 U. S. 25, 39-40, I stated my agreement with the 'plain implication' of the *Wolf* opinion that the Federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. In the light of the *Wolf* case, the *Trupiano* rule is not a Constitutional command, but rather an evidentiary policy adopted by this court in the exercise of its supervisory powers over federal courts. Cf. *McNabb v. United States*, 318 U. S. 332."

At page 16 counsel for the Government states that in the instant case "there was no searching". Nothing could

be further from the truth for here we are presented with a picture of a person in the employ of the Government, engaging petitioner in lengthy and involved conversation. According to the testimony of Agent Lee, the conversation between Chin Poy and the petitioner began with small talk and gossip of New York's Chinatown and was gradually and pointedly led around to the incident of January 22, 1950. Apparently counsel for the Government has never heard of or read the terms of description frequently applied to the manner of eliciting the testimony of witnesses appearing in court proceedings and the present popular Congressional hearings, namely: "under a searching questioning" or "under a searching cross-examination". The most concise and literate minds in existence in this Country today, that is the reporters and rewrite men employed by the various newspaper publications throughout these United States could find no more descriptive term than the word "searching". The Government contends at page 17 that the word "search connotes uncovering that which is hidden, prying into hidden places for that which is concealed". What can be considered as more hidden or concealed than the thoughts of a human being?

At page 17 the Government attempts to liken the radio transmitter used here to the detectaphone used in *Goldman v. United States*, 316 U. S. 129. The difference between the two instruments is very marked in that the detectaphone or induction coil merely amplifies sounds which might have been detected by one with extremely keen hearing whereas the short wave radio does not amplify but actually transmits and propels upon the ether waves the matter received by the microphone attached to the transmitter. This distinction will be discussed at greater length later herein.

The case of *Hester v. United States*, 265 U. S. 57, is not in point, since in that case there was no actual entry into the building in question but merely a trespass upon the land of the defendant.

In *Johnson v. The United States*, 333 U. S. 10, cited in the Government's brief, this Honorable Court held that where officers were legally in a public hallway of a hotel and smelled the fumes of burning opium they were not justified in trespassing upon the premises of the room from which these fumes emanated.

At page 19 it is argued by the Government that if Chin Poy had taken pictures of petitioner with a concealed camera that would be admissible. The only trouble with this argument is that it does not follow through to a logical conclusion since if the pictures taken had been of petitioner's private papers they unquestionably would have been rejected as being obtained in violation of the Fourth Amendment. The Government's argument also states that "that would be as legitimate as his testimony telling what he saw" but fails to take into consideration that in the instant case *Chin Poy never appeared or testified*.

Running throughout the argument of the Government is the false premise that Chin Poy's entrance into the premises of petitioner was not a trespass and repeatedly we find the statement that entrance was not obtained by fraud or stealth. It is respectfully submitted that the record amply demonstrates without further argument the fallacy of this contention of the Government nor does the Government's contention gain weight by its constant repetition.

At page 24 of the Government's brief we find the argument that this Honorable Court does not condemn legal means of obtaining evidence because same might also have

been obtained by illegal methods. The contrary is also true and this Court has repeatedly refused to condone the obtaining of evidence by illegal methods because it might also have been possible to have obtained same by legal methods. This disposes of the argument offered at page 25 of the brief namely: the same results might have been obtained by Agent Lee standing on the street in front of petitioner's premises or by his posing as a customer in the laundry. It likewise disposes of the argument as to what Chin Poy might have been permitted to testify to, particularly since he was never called as a witness nor any explanation or excuse offered for his non-appearance in any court.

Replying to Point II of the Government's argument it is respectfully submitted that the Government throughout its argument offered under this point ignores the purpose and mechanical makeup of the instrument used here, the radio transmitter and radio receiver set. At page 29 they attempt to describe the radio in question as "merely a mechanical means of eavesdropping".

Under Section 153 of title 47, U. S. C. we find among others the following definitions:

"(b) 'Radio Communication' or 'Communication by Radio' means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus and services (among other things the receipt, forwarding and delivery of communications) incidental to such transmission."

"(k) 'Radio Stations' or 'Station' means a station equipped to engage in radio communication or radio transmission of energy."

“(1) ‘Mobile Station’ means a radio communication station capable of being moved and which ordinarily does move.”

If the Government's contention was correct then there could not be any prosecution for violation of the various sections of title 47 U. S. C. where private individuals used mobile or portable radio transmitters and receiving sets, particularly if they are careful not to make any statement which might be construed as an effort to broadcast and merely conduct an imaginary conversation which would be picked up and transmitted by the microphone and transmitter concealed upon their person. There have been many successful prosecutions of persons operating from race tracks with microphones and transmitters of the type and nature used here and by means of which they are able to broadcast to confederates outside the track having receiving sets similar to the one used by Agent Lee, the running and the results of the races viewed by them. If the Government's contention made in the instant case were proper then the law could easily be circumvented by the person carrying the transmitter stationing himself near one of the loud speakers located at the race track from which emanates a description of the running of the race, so long as the party in question refrained from speaking to the party receiving the result of the broadcast.

Likewise unscrupulous people using the same type of transmitter and receiver have been successful in mulcting unwitting bookmakers when the confederate with the transmitter instead of being stationed at a race track was stationed near a telephone line or radio from which the results were obtained for re-broadcasting to the party, with the receiving set, waiting in the immediate vicinity of the place of operation of the bookmaker. In prosecutions for

violations of this type no distinction has been made nor could be made between the broadcasts by the party with the transmitter of what he has heard on the telephone or radio or the re-broadcast by him of what was being said over the radio or telephone.

At page 30 it is contended by the Government that a broadcast of a conversation does not consist of a communication by radio within the meaning of the Communication Act. Apparently the counsel for this Government is ignorant of or chooses to ignore the many instances when commercial broadcasters over standard wave lengths immediately preceding or following the scheduled broadcast, have made personal remarks believing themselves to be "off the air" and not realizing that they were talking into or before a "live" microphone. These remarks usually have been of a derogatory or improper nature and whenever this has occurred it has resulted in action being taken by the Federal Communication Commission against the individual and the Radio Station involved and quite often has resulted in the imposition of monetary fines by the Federal Communication Commission.

The Government's brief totally ignores the fact that not only was this an interception of a radio broadcast but that also Agent Lee's testimony resulted in the divulging and publishing of the contents of a radio communication. Too, it results in a person not entitled thereto, since the petitioner had never given his consent to broadcast to Agent Lee, receiving a message by radio and using the same for his own benefit. Both of these things as well as the interception complained of are within the interdiction of section 605 of title 47 U. S. C.

In *Nardone v. United States*, 302 U. S. 379 it was held that the phrase "no person" embraces Federal Agents

engaged in the detection of crime and that the phrase "to divulge" includes testimony in Court.

In conclusion it is respectfully submitted that if, as contended by the Government at page 33, the radio instrument used here was not a protected channel of communication any more than a detectaphone or hearing aid there would have been no rhyme or reason for setting forth a description of this type of instrument in section 153 of title 47 U. S. C. as set forth at length *supra*.

In reply to Point III of the Government's brief in opposition it is respectfully submitted that the Government fails to answer in any manner the fact that, as pointed out at pages 50 and 51 of petitioner's brief that when the court stated "if before the arrest" the trial court twice in its charge gave to the Jury for its consideration a state of facts that did not exist. When we consider the proposition presented here we must come to the inevitable conclusion that if a defendant after arrest is to be held to have acquiesced in an accusatory statement made by a co-defendant in his presence by reason of his failure to deny same we destroy completely the constitutional guaranty contained within the Fifth Amendment against compelling anyone in a criminal prosecution to be a witness against himself. For this Honorable Court to rule as urged by the Government would mean that every defendant must testify against himself prior to trial by making a statement in answer to an accusation of this type made by a co-defendant or by the repetition, whether true or false, of such an accusation by an officer of the law to a defendant.

**CONCLUSION**

**The judgment of conviction should be reversed and the indictment dismissed.**

Respectfully submitted,

GILBERT S. ROSENTHAL

HENRY K. CHAPMAN

*Attorneys for Petitioner*

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No. 543

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In the Supreme Court of the United States

OCTOBER TERM, 1951

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT

FILED FOR THE UNITED STATES IN OPPOSITION

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(1)

# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 543

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the Court of Appeals (Pet. 44-70) is not as yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1951 (R. 432).<sup>1</sup> By order dated December 11, 1951, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including January 19, 1952. The petition was filed on January 18, 1952.

<sup>1</sup> The record in this case, designated by the symbol "R", is unprinted.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether the overhearing by a government narcotics agent, through the use of a radio receiver, of a personal conversation in the public room of petitioner's laundry between petitioner and a government employee who had a radio transmitter concealed on his person, constituted an illegal search and seizure.

2. Whether the overhearing of the conversation constituted an interception in violation of Section 605 of the Federal Communications Act.

3. Whether the judgment of conviction should have been reversed because the court admitted testimony that after his arrest, petitioner remained silent in the face of accusatory statements made in his presence, where the court gave a full exposition of the law on the subject in his charge to the jury and admonished them to disregard such evidence.

#### STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 605 of the Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information there-

in contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

#### STATEMENT

After a jury trial, petitioner was found guilty under both counts of a two-count indictment charging him with (1) selling opium in violation of 21 U. S. C. 173 and 174 and (2) conspiring with one Gong Len Ying, and others unknown, to violate various sections of the United States Code<sup>2</sup> relating to the possession of narcotic drugs (R. II-V). He was sentenced to three years' imprisonment on each count, the terms to run concur-

<sup>2</sup> 21 U. S. C. 173-174; 26 U. S. C. 2553 (a), and 26 U. S. C. 2554 (a).

rently, and was fined \$500 on the substantive count (R. 398).

The Government's evidence may be summarized as follows:

On January 22, 1950, about 2:00 o'clock in the afternoon, Benny Gim, an undercover agent of the Bureau of Narcotics, was introduced to Gong Len Ying at a coffee shop in New York City (R. 4, 19, 95). Gim asked Ying if he had any opium to sell, and Ying said that he could supply opium in any quantity at \$550 per pound provided he was given sufficient notice beforehand. Gim said he wanted the opium that night, and while Ying at first said he could not get it so soon, he finally agreed to deliver it at 6:30 that evening. (R. 6; see also R. 94-96.)

At 6:30 that evening Gim and Ying met at a previously designated street corner. Ying asked for the money, and Gim counted out \$550 for a pound of opium. Ying thereupon told Gim to wait and he would return shortly with the opium. (R. 7).

City detectives who were maintaining surveillance and Narcotics Agent L. J. Lee observed that Ying went to 15 Mott Street and stayed there

\* Gong Len Ying, who is referred to in the testimony as Gong, and in the opinion below as Ying, will hereinafter be referred to as Ying. He was charged as a codefendant, pleaded guilty to both counts of the indictment (R. II-V), and testified as a Government witness during this trial (R. 203). Ying's regular business was selling Chinese food to various laundries (R. 222).

until about 7:00 p. m., when he left with petitioner (R. 97). The two men walked to 79 Mott Street and remained there for 20 to 25 minutes. Ying came out first, followed by petitioner a second or two later. They both stood on the sidewalk about half a minute, and then Ying walked back to the corner where he had met Gim (R. 7, 66-67, 97). Ying testified that at 15 Mott Street he gave petitioner the money he had received from Gim, keeping \$70 as his own share, and that the two then went to 79 Mott Street, where petitioner gave him the opium wrapped in a Chinese newspaper (R. 204-205, 225-226).

On Ying's return to the corner, he handed Gim the package still wrapped in the Chinese newspaper (R. 7, 67, 97). Gim took the package to police headquarters where it was opened and found to contain a pound of opium. Ying was seen to return to 15 Mott Street after the transaction on the street corner (R. 67-68, 97).

On February 2, 1950, at about 7:30 p. m. Gim again met Ying. Gim told Ying that "the opium was fairly good" and that he wanted to buy 20 pounds. Ying at first said that he could not get such a large quantity on such short notice, but when Gim took a large roll of bills from his pocket and said he had \$10,000 to pay for it, Ying said that he would call his partner. Ying then made a telephone call and on his return said that he was unable to reach his partner (R. 13-14). Gim asked Ying to visit the places his partner

frequented and tell him that he, Gim, wanted the opium that night. Ying agreed to return at 10:30 p. m. and let Gim know definitely whether he could give him the opium (R. 14-15).

Officers followed Ying to Hoboken, New Jersey, and saw him visit three laundries there and then return to meet Gim (R. 70). At 10:30 p. m., Ying told Gim that he had been unable to reach his partner, and asked for more advance notice in the future (R. 15-16, 206-208).

On February 9, about 7:30 p. m., there was, by prior arrangement, another short meeting between Ying and Gim at which Gim asked for twenty pounds of opium (R. 16-17, 47, 211). Ying replied that he could have the opium the following Sunday, February 12, and a meeting was arranged for 12:30 in the afternoon of that day (R. 17, 71, 98, 211-213). Ying testified that he thereupon called petitioner on the telephone and asked him whether he had the opium. Petitioner said he did not know whether he had any and he would see on Sunday, February 12, when they would meet at 15 Mott Street (R. 213-214).

On February 12, about noon, Ying met Gim and told him he "would see the man" about 1:30 p. m. and be ready to deliver (R. 17-18, 71, 99). Ying telephoned petitioner and went with him to a restaurant (R. 72, 83-84, 99, 215-217, 228-230). Ying testified that petitioner

there said (R. 216): "I don't know whether or not we have any [opium]. If there is any money then we will talk." Ying then left petitioner in the restaurant, and rejoined Gim (R. 18, 72, 99, 231-234): Ying told Gim he would have to have the money before he delivered the opium. Gim refused to part with \$10,000 without seeing and testing the opium first. Ying left, agreeing to talk with his partner and return in a few minutes (R. 18). He was seen by city detectives and Agent Lee to go back to petitioner in the restaurant and talk with him there in a booth (R. 72, 100). Ying went back and forth between Gim and petitioner three times and each time refused to deliver the opium until he received the money. Finally, seeing that further negotiations were futile, Gim gave the signal that there would be no transaction (R. 17-19, 51, 135). Ying returned to the restaurant where petitioner was waiting (R. 164-165).

City detectives arrested Ying and petitioner as they were walking away from the restaurant together (R. 73, 87, 101, 306). Petitioner was questioned by the city detectives and by the agent in English and Chinese (R. 52, 73, 89). He claimed that he did not know Ying, and had nothing to do with him (R. 73, 89-90, 303). The

\* At the trial petitioner explained the various transactions with Ying as pertaining to the contemplated purchase of a wet wash laundry (R. 267-275, 282-286), although he testified that he never knew its address (R. 299).

next day, February 13, he was brought before a United States Commissioner for hearing (R. 61). Petitioner was then released on bail (R. 287).

On March 30, 1950, after the release of petitioner on bail, Agent Lee, together with a special employee of the Bureau of Narcotics, Chin Poy, went to one of petitioner's two laundries at 1222 Washington Street in Hoboken, New Jersey (R. 103-104, 178-179). Lee remained outside in the vestibule of a variety store, four doors away, where he operated a radio receiving set which he carried in his brief case (R. 181-183). Chin Poy entered the laundry where he found petitioner (R. 104), who had been an acquaintance for 15 years (R. 292) and was his former employer (R. 298). The laundry consisted of one large room and a storeroom, with separate living quarters in the rear. There was a store window in front of the laundry (R. 191). Agent Lee, listening on his receiver, heard Chin Poy, who carried a radio transmitter on his person, engage in a general conversation with petitioner about the gossip in Chinatown (R. 188). As Chin Poy and petitioner talked, customers would go in and out of the shop getting their laundry (R. 104). During the conversation, Chin Poy asked petitioner if the opium, which he was said to have according to gossip in Chinatown, belonged to him. Petitioner said no, that the opium belonged to a syndicate of which he was the representative (R. 105-107, 115-116, 188). He said he employed

a truck driver by the name of Gong Len Ying who did all the transacting, that he had nothing to do with it and could not get into trouble, and "the Government didn't have anything on him" (R. 116). Chin Poy then asked petitioner if he could place an order for a pound of opium. Petitioner said he could do so as syndicate representative (R. 107-108). At a subsequent meeting between Chin Poy and petitioner, on April 2, 1950, in front of 35 Mott Street in New York City, when Agent Lee again audited the conversation, petitioner again admitted he was the representative of the syndicate (R. 113-114).

#### ARGUMENT

1. Though he raised no such objection in the trial court,<sup>5</sup> petitioner urged in the court below, and now urges here (Pet. 18-28), that it was error to permit Agent Lee to testify as to the

<sup>5</sup> At the trial, defense counsel objected to the testimony solely on the ground that it related to another transaction not bearing on the crime charged (R. 106-108). The court instructed the jury to disregard any evidence relating to any transaction not included in the crime charged, and charged that the conspiracy is presumed ended by arrest (R. 109). Later, the court again told the jury that petitioner was not being tried for any offense committed after January 22 (R. 114). It did rule that an admission relating to the crime committed on January 22, 1950, could be allowed in evidence regardless of when it was made (R. 114). Defense counsel agreed with this ruling, but contended that the defense was prejudiced by other parts of the same conversation, revealing a later transaction not included in the indictment (R. 114-115).

conversation he overheard on his radio receiver between Chin Poy and petitioner after petitioner's release on bail, arguing that such evidence was obtained in violation of the Fourth Amendment. We submit that this contention was properly rejected.

The decision in *Olmstead v. United States*, 277 U. S. 438, established the proposition that the overhearing by a mechanical contrivance of a private conversation is not *per se* violative of the rights secured under the Fourth Amendment where otherwise there is no searching of an individual's house, his person, his papers, or his effects. That ruling, consistently followed by this Court (*Goldstein v. United States*, 316 U. S. 114, 120; *Goldman v. United States*, 316 U. S. 129, 135; see also *United States v. Dennis*, 183 F. 2d 201, 225 (C. A. 2), affirmed, 341 U. S. 494), applies here. Here, as in *Olmstead*, "we have testimony only of voluntary conversations secretly overheard." 277 U. S. at 464. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." *Ibid*.

In *Goldman v. United States*, *supra*, as here, officers of the law employed a mechanical device to make a conversation audible beyond the confines of the place in which it was conducted. There, government agents overheard conversations of the defendants by means of a detectaphone affixed to the wall adjoining defendants'

office. In an effort to distinguish the *Olmstead* decision, the defendants argued to this Court that the employment of the detectaphone violated the Fourth Amendment because where "one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room," 316 U. S. at 135. Rejecting this distinction and refusing to overrule *Olmstead*, this Court held that there had been no violation of the Fourth Amendment. In this case too, we submit, the effort to distinguish a detectaphone from a radio transmitter, both employed to make audible to outsiders speech presumably intended "to be confined within the four walls of the room," is "too nice for practical application of the Constitutional guarantee \* \* \*." *Ibid*.

In his dissenting opinion below, upon which petitioner relies, Judge Frank points out that a contrary result would have been reached in the *Goldman* case had there been a trespass connected with the use of the detectaphone (see 316 U. S. at 134-135), and argues that, in this case, the Government committed a trespass into petitioner's "home" by sending Chin Poy into petitioner's laundry with a radio transmitter attached to his person. It should be noted that this argument in no way affects the admissibility of the testimony based on the subsequent conver-

sation overheard by radio between Chin Poy and petitioner in which petitioner repeated on the street the admission that he was an agent for a syndicate (R. 113-114). It should also be noted that the place where the conversation in question occurred was neither a private home (cf. *Nueslein v. United States*, 115 F. 2d 690 (C. A. D. C.)), nor a private office (cf. *Goldman v. United States*, *supra*), but a laundry to which the general public was invited and which was in fact visited by various customers while the conversation was in progress.<sup>6</sup> Cf. *Davis v. United States*, 328 U. S. 582, 592-593. If an agent posing as a customer had overheard the petitioner's admissions to Chin Poy, there could have been no question of the admissibility of the agent's testimony, since his entry into the premises would have been legal.

What is more important here, however, is that Chin Poy, the only government agent who entered petitioner's laundry, entered legally, with petitioner's permission, and was voluntarily conversed with by petitioner. While it was concealed from petitioner that the man he addressed was a government agent and that a device was being employed to make the conversation audible to another government agent, there is clearly no

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<sup>6</sup> The fact that there were sleeping quarters back of the storage room of the laundry does not establish the contention that petitioner's "home" was invaded as there was no entry into those quarters.

prohibition against the use of artifice to apprehend those engaged in criminal enterprises. See the quotation in the opinion below (Pet. 49, n. 6) from the opinion of Chief Justice Taft in *Olmstead v. United States*, *supra*, at 468; see also *Sorrells v. United States*, 287 U. S. 435, 441. If Chin Poy had managed to get petitioner to talk loudly enough to be heard by an agent standing next to the laundry, it could not seriously be argued that testimony as to the conversations would be inadmissible. And that, in essence, is the function which the radio transmitter served. Bearing in mind that stratagems are permissible, if not essential, in the apprehension of criminals, we think the substantial identity in operation and purpose between a detectaphone and a radio transmitter leaves no room for creation of a valid Constitutional distinction by artificial extension of the concept of "trespass."

2: Equally without merit is petitioner's contention that the overhearing of his conversation with Chin Poy constituted an "interception" prohibited by Section 605 of the Federal Communications Act (*supra*, pp. 3-4). As the court below held (Pet. 45-46), the simple fact of this case was that there "was no 'interception' of a communication by wire or radio which is what the statute forbids. The radio device was merely a

<sup>7</sup> Like the contention based on the Fourth Amendment, this argument was raised for the first time on appeal. See note 5, *supra*.

mechanical means of eavesdropping, just as the detectaphone was in the *Goldman* case." Petitioner, holding a face-to-face conversation with Chin Poy, was engaged in no communication of the kind safeguarded against interception by the Communications Act. The *Goldman* decision made clear that the purpose of the statute was to protect "the means of communication and not \* \* \* the secrecy of the conversation." 316 U. S. at 133. Even a message sent over a wire is not immune from disclosure where there is no "interception" in the mechanical sense between the lips of the sender and the ear of the receiver. *Ibid.*; *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (C. A. 2). The terms of Section 605 of the Federal Communications Act could not by any logical interpretation be extended to the protection of direct, untransmitted conversations between two persons.

3. Petitioner also alleges as error (Pet. 33<sup>et seq.</sup>) the reception into evidence of accusatory statements made in his presence by codefendant Ying after the arrest. Since there is substantial authority to support the position that testimony as to silence when confronted with an accusation is admissible,\* the court was at least justified in deferring a ruling as to exclusion when the ques-

\*See *Sparf and Hansen v. United States*, 156 U. S. 51, 56; *Egan v. United States*, 137 F. 2d 369, 380-381 (C. A. 8); *Graham v. United States*, 15 F. 2d 740, 742-743 (C. A. 8).

tion was first raised. And, assuming *arguendo* that such statements were not admissible, any error in their admission was plainly cured by the court's subsequent charge to the jury to ignore them.<sup>9</sup>

At the trial, Detective Monahan testified that, immediately after the apprehension of Ying and petitioner, they were kept apart and questioned. At that time petitioner denied knowing Ying (R. 73). Thereafter, Monahan testified, the two men were "booked" and taken to the Bureau of Narcotics, where they were put together in one room. At this point of the examination, defense counsel objected to any testimony as to what Ying had said after arrest as not binding on petitioner. The court, however, allowed Monahan to testify that, while petitioner at first denied delivering opium to Ying or having anything to do with him (R. 74), later, when Ying admitted receiving the opium from petitioner, petitioner remained silent and said nothing (R. 75). There was extended argument thereafter of the question whether testimony as to silence in the face of an accusatory statement is admissible (R. 75-80). The court reserved decision, and allowed cross-examination to proceed (R. 80). On cross-ex-

<sup>9</sup> *United States v. Lo Biondo*, 135 F. 2d 130 (C. A. 2) is plainly distinguishable by the fact that there the trial court gave no instruction to the jury to disregard such evidence. In reversing, the court of appeals made it clear that, had such instruction been given, there would have been no basis for setting aside the conviction. 135 F. 2d at 132.

amination, Detective Monahan testified that petitioner "always denied" having any transaction with any opium (R. 90). Agent Lee also testified that petitioner denied that the opium was his (R. 103). When Ying was questioned by Government counsel as to what the detective had asked him, defense counsel objected (R. 219). Again there was argument as to whether silence in the face of an accusatory statement can constitute an admission (R. 219-222). The court allowed counsel to submit briefs on this point of law (R. 222) and it was not pursued further. After the Government had rested its case, defense counsel again raised his objection to admission of the remarks of Ying after the arrest, and, following extensive argument (R. 244-255), the motion was denied (R. 255). However, in his instructions to the jury, the trial court told them that admissions and statements of a conspirator after the conspiracy has terminated do not bind a co-conspirator (R. 349); that after the arrest of the conspirators the conspiracy is terminated and no admission or statement made by a conspirator after the arrest binds a co-conspirator (R. 349-350); that the act or statement to bind a co-conspirator must be made by a conspirator while the conspiracy is in effect, in furtherance of the object of the conspiracy, and before its termination (R. 350). Later, the court instructed the jury (R. 360): "No admission made by Gong after the arrest can bind On Lee.

I have already so charged, I think, fully." Then the court instructed the jury as follows (R. 360-362):

I will charge the jury that if before the arrest the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest in the presence of Monahan and possibly some of the other agents he was told or heard Gong saying, "you gave it to me; you delivered it to me," then under those circumstances the defendant On Lee could remain silent, and his silence would not be regarded as tacit admission that he did so.

The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing, and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.

Now I modify that by this consideration: if before the arrest he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him "I got it from you; you delivered it to me," in that case I would say that silence did not con-

stitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient.

In the light of this charge, we submit, the court below was clearly correct in concluding that neither the colloquies between counsel and the trial court nor the initial admission of his co-defendant's accusatory statements prejudiced petitioner. As to legal arguments during the trial, the courts have necessarily and properly recognized that such discussions of the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. *Fredrick v. United States*, 163 F. 2d 536, 548 (C. A. 9), certiorari denied, 332 U. S. 775; *Goldstein v. United States*, 63 F. 2d 609, 613 (C. A. 8). And, while the court below recognized (Pet. 51) that "in exceptional circumstances the prejudice from improperly admitted evidence may be too serious to be cured by a charge to disregard it," there are no such "exceptional circumstances" here as would warrant reversal of the court's judgment that the extensive charge to the jury had cured any possible error. In the light of the evidence which the judge and jury had heard, that Monahan talked with petitioner alone before he booked him and with petitioner and

Ying together after the booking, we think that the phrase "before the arrest" in the charge could not have the implications which the dissenting judge imputes to it. The charge as a whole made it clear that, having previously denied guilt, petitioner was under no duty to repeat the denial despite Ying's accusation. . .

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,  
*Solicitor General.*

JAMES M. MCINERNEY,  
*Assistant Attorney General.*

BEATRICE ROSENBERG,

CARL H. IMLAY,

*Attorneys.*

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No. 543

**In the Supreme Court of the United States**

OCTOBER TERM, 1951

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the Court of Appeals (Pet. 44-70) is reported at 193 F. 2d 306.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1951 (R. 432).<sup>1</sup> By order dated December 11, 1951, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including January 19,

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<sup>1</sup> The record in this case, designated by the symbol "R," is unprinted.

1952. The petition was filed on January 18, 1952, and was granted on March 3, 1952. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether the overhearing by a government narcotics agent, through the use of a radio receiver, of a conversation in the public room of petitioner's laundry between petitioner and a government employee who had a radio transmitter concealed on his person constituted an illegal search and seizure.

2. Whether the overhearing of the conversation constituted an interception in violation of Section 605 of the Federal Communications Act.

3. Whether the judgment of conviction should have been reversed because the court admitted testimony that after his arrest petitioner remained silent in the face of accusatory statements made in his presence, where the court gave a full exposition of the law on the subject in his charge to the jury and admonished them that, if petitioner had previously denied the accusation, his silence could not constitute an admission.

#### STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 605 of the Act of June 19, 1934, 48 Stat. 1103, 47 U.S.C. 605, provides:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the

same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

#### STATEMENT

After a jury trial, petitioner was found guilty under both counts of a two-count indictment charging him with (1) selling opium in violation of 21 U.S.C. 173 and 174 and (2) conspiring with one Gong Len Ying and others unknown to violate various sections of the United States Code<sup>2</sup> relating to the possession of narcotic drugs (R. II-V). He was sentenced to three years' imprisonment on each count, the terms to run concurrently, and was fined \$500 on the substantive count (R. 398).

<sup>2</sup> 21 U.S.C. 173, 174, 26 U.S.C. 2553(a), and 26 U.S.C. 2554(a).

The Government's evidence may be summarized as follows:

On January 22, 1950, about 2:00 o'clock in the afternoon, Benny Gim, an undercover agent of the Bureau of Narcotics, was introduced to Gong Len Ying<sup>3</sup> at a coffee shop in New York City (R. 4, 19, 95). Gim asked Ying if he had any opium to sell, and Ying said that he could supply opium in any quantity at \$550 per pound provided he was given sufficient notice beforehand. Gim said he wanted the opium that night, and while Ying at first said he could not get it so soon, he finally agreed to deliver it at 6:30 that evening. (R. 6; see also R. 94-96.)<sup>4</sup>

At 6:30 that evening Gim and Ying met at a previously designated street corner. Ying asked for the money, and Gim counted out \$550 for a pound of opium. Ying thereupon told Gim to

<sup>3</sup> Gong Len Ying, who is referred to in the testimony as Gong, and in the opinion below as Ying, will hereinafter be referred to as Ying. He was charged as a co-defendant, pleaded guilty to both counts of the indictment (R. II-V), and testified as a Government witness during the trial (R. 203). Ying's regular business was selling Chinese food to various laundries (R. 222).

<sup>4</sup> During this meeting, as during some of the subsequent meetings (R. 6-7, 25-26, 95; see also R. 16, 32, 34, 97, 98, 99), agent Gim carried on his person a miniature radio transmitter or microphone so that his conversations could also be heard by agent Lee who was stationed on the street nearby with a short-wave radio receiver in his brief case tuned in to the proper frequency. Both government agents took the stand and corroborated each other as to what was said during these conversations which transpired prior to the arrest of petitioner.

wait and he would return shortly with the opium.  
(R. 7.)

City detectives who were maintaining surveillance and Narcotics Agent L. J. Lee observed that Ying went to 15 Mott Street<sup>5</sup> and stayed there until about 7:00 p.m., when he left with petitioner (R. 97). The two men walked to 79 Mott Street and remained there for 20 to 25 minutes. Ying came out first, followed by petitioner a second or two later. They both stood on the sidewalk about half a minute, and then Ying walked back to the corner where he had met Gim (R. 7, 66-67, 97). Ying testified that at 15 Mott Street he gave petitioner the money he had received from Gim, keeping \$70 as his own share, and that the two then went to 79 Mott Street, where petitioner gave him the opium wrapped in a Chinese newspaper (R. 204-205, 225-226).

On Ying's return to the corner, he handed Gim the package still wrapped in the Chinese newspaper (R. 7, 67, 97). Gim took the package to police headquarters where it was opened and found to contain a pound of opium. Ying was seen to return to 15 Mott Street after the transaction on the street corner (R. 67-68, 97).

On February 2, 1950, at about 7:30 p.m. Gim again met Ying. Gim told Ying that "the opium

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<sup>5</sup> Petitioner's Chinese family name is Eng (R. 201). The Eng family maintained rooms at 15 Mott Street (R. 132, 154, 225).

was fairly good" and that he wanted to buy 20 pounds. Ying at first said that he could not get such a large quantity on such short notice, but when Gim took a large roll of bills from his pocket and said he had \$10,000 to pay for it, Ying said that he would call his partner. Ying then made a telephone call and on his return said that he was unable to reach his partner (R. 13-14). Gim asked Ying to visit the places his partner frequented and tell him that he, Gim, wanted the opium that night. Ying agreed to return at 10:30 p.m. and let Gim know definitely whether he could give him the opium (R. 14-15).

Officers followed Ying to Hoboken, New Jersey, and saw him visit three laundries there and then return to meet Gim (R. 70). At 10:30 p.m., Ying told Gim that he had been unable to reach his partner, and asked for more advance notice in the future (R. 15-16). He said also that had he had advance notice he could have obtained fifty pounds of opium (R. 16).

On February 9, about 7:30 p.m., there was, by prior arrangement, another short meeting between Ying and Gim at which Gim asked for twenty pounds of opium (R. 16-17, 47, 211). Ying replied that he could have the opium the following Sunday, February 12, and a meeting was arranged for 12:30 in the afternoon of that day (R. 17, 71, 98, 211-213). Ying testified that he thereupon called petitioner on the telephone and asked him whether

he had the opium.<sup>6</sup> Petitioner said he did not know whether he had any and he would see on Sunday, February 12, when they would meet at 15 Mott Street (R. 213-214).

On February 12, about noon, Ying met Gim and told him he "would see the man" about 1:30 p.m. and be ready to deliver (R. 17-18, 71, 99). Ying telephoned petitioner and went with him to a restaurant (R. 72, 83-84, 99, 215-217, 228-230). Ying testified that petitioner there said (R. 216): "I don't know whether or not we have any [opium]. If there is any money then we will talk." Ying then left petitioner in the restaurant, and rejoined Gim (R. 18, 72, 99, 231-234). Ying told Gim he would have to have the money before he delivered the opium. Gim refused to part with \$10,000 without seeing and testing the opium first. Ying left, agreeing to talk with his partner and return in a few minutes (R. 18). He was seen by city detectives and Agent Lee to go back to petitioner in the restaurant and talk with him there in a booth (R. 72, 100). Ying went back and forth between Gim and petitioner three times and each time refused to deliver the opium until he received the money. Finally, seeing that further negotiations were futile, Gim gave the signal that there would be no transaction (R. 17-19, 51,

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<sup>6</sup> Petitioner, admittedly gave Ying his telephone number on a slip of paper at petitioner's laundry in Hoboken about a month before his arrest (Ex. 6, R. 201-203, 228, 271).

135). Ying returned to the restaurant where petitioner was waiting (R. 164-165).

City detectives arrested Ying and petitioner as they were walking away from the restaurant together (R. 73, 87, 101, 306). Petitioner was questioned by the city detectives and by the agent in English and Chinese (R. 52, 73, 89). He claimed that he did not know Ying, and had nothing to do with him (R. 73, 89-90, 303).<sup>7</sup> The next day, February 13, he was brought before a United States Commissioner for hearing (R. 61). Petitioner was then released on bail (R. 287).

On March 30, 1950, after the release of petitioner on bail, Agent Lee, together with a special employee of the Bureau of Narcotics, Chin Poy, went to petitioner's laundry at 1222 Washington Street in Hoboken, New Jersey (R. 103-104, 178-179), arriving about 2:00 o'clock in the afternoon (R. 178, 182, 191). Lee remained outside in the vestibule of a variety store, four doors away, where he operated a radio receiving set which he carried in a small briefcase (R. 181-183). Lee had a crystal conductor in his ear connected to the receiving set by a wire (R. 127, 182). There was no recording device affixed to the receiver (R. 196) and the set was rigged merely as a listening device.

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<sup>7</sup> At the trial petitioner explained the various transactions with Ying, including their meeting on February 12, as pertaining to the contemplated purchase of a wet wash laundry (R. 267-275, 282-286), although he testified that he never knew its address (R. 299).

Chin Poy, who carried a miniature radio transmitter on his person,<sup>8</sup> entered the laundry where he found petitioner (R. 104), who had been an acquaintance for 15 years (R. 292) and was Chin's former employer (R. 298). The laundry consisted of a large room and a storeroom. The storeroom had a counter in it with ironing tables behind that. There were separate living quarters in the rear of the laundry. There was a store window in front of the laundry (R. 191), and Chin Poy could be seen from the street as he stood in the laundry room (R. 181). Agent Lee, listening in on his receiver, heard Chin Poy engage in a general conversation with petitioner in Chinese about the gossip in Chinatown (R. 188-189). As Chin Poy and petitioner talked, customers would go in and out of the shop getting their laundry (R. 104). During the conversation, Chin Poy asked petitioner if the opium, which he was said to have according to gossip in Chinatown, belonged to him. Petitioner said no, that the opium which he had sold belonged to a syndicate of which he was the representative (R. 105-107, 188). Chin Poy then asked petitioner if he could place an order for a pound of opium. Petitioner said he could take an order as representative of the syndicate (R. 107-108).

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<sup>8</sup> The radio transmitter or microphone was carried in the inside pocket of Chin Poy's overcoat. A small antenna ran along the wearer's arm. It had a switch which could be turned on or off (R. 25-26).

At a subsequent meeting between Chin Poy and petitioner on April 2, 1950 on the sidewalk in front of 35 Mott Street in New York, Agent Lee again audited a conversation between the two in the same manner (R. 113-117). Petitioner admitted that he was the representative of the syndicate which owned the opium sold on January 22, that he employed "a truckdriver by the name of Gong [Ying]" to do the transacting and to sell his opium for him and "therefore he would not get into any trouble." He said "that the Government didn't have anything on him and he felt that he could beat the case" (R. 116-117).

Petitioner denied making any of the admissions that Agent Lee testified he heard on March 30 and April 2 (R. 292-299).

#### SUMMARY OF ARGUMENT

### I

Petitioner contends that the overhearing by a government agent through the use of a radio receiver of a conversation voluntarily entered into between petitioner and a government employee who came into the public room of his laundry with a miniature pocket transmitter concealed on his person violated his constitutional rights. Although he raised no such contention on the trial, he now contends that the trial court should have excluded testimony relating to the contents of such conversation as the fruit of an illegal search and seizure.

There is, however, no basis for the application of this rule in the instant case. The mere use of an amplification device to overhear conversations is not itself a search and seizure, *Goldman v. United States*, 316 U.S. 129. Here, entry by Chin Poy into a public room was lawful and fully acquiesced in by petitioner. He did nothing which any member of the public could not legally have done. He conducted no search and made no seizure. The concealment on his person of a radio transmitter did not render his legal entry illegal. There was no element of trespass in any action of the government agents, and no behavior which in any way renders the admissions which petitioner was heard to make the fruit of an illegal search and seizure. There was no entry by the use of fraud, stealth, or duress, and no seizure of any evidence. There are, in short, none of the elements which could warrant a finding that the evidence in question was unlawfully secured and therefore inadmissible.

## II

The overhearing by the use of a miniature radio receiver of a face-to-face conversation between petitioner and a government employee who carried a miniature radio transmitter on his person, is not the interception of a communication by wire or radio within the interdiction of Section 605 of the Federal Communications Act (*supra*, pp. 3-4). There was no "interception" within the meaning

of the Act because there was no mechanical interjection of a listening device into a federally-protected communications conduit. There is no support in the literal language or the history of the Communications Act for the proposition that it extends to the protection of face-to-face conversations. Other sections of the Act indicate that its policy is to safeguard the privacy of communications by wire or radio only. Clearly, the fact that the listening device itself was a miniature short wave radio does not establish a violation of Section 605. Auditing devices which are not themselves used for the transmission of radio communications do not come within the purview of the Act.

### III

No prejudicial error resulted from the admission of testimony of an officer that while petitioner at first denied knowing Ying, his co-defendant, petitioner later remained silent while Ying gave a complete exposition of the involvement of both in the crime. When objection was made by defense counsel to this line of questioning, the court reserved its ruling on its admissibility. Later the court gave full and complete instructions to the jury addressed to this specific testimony, charging them that no admission made by Ying after the conspiracy had ended could bind petitioner. Also, he charged that if petitioner had once denied his involvement in the crime (which the witnesses testified he did)

the jury was to draw no inferences from his failure to repeat the denial when Ying made his accusatory remarks in his presence. The jury could not have been misled in view of the instructions of the court on the applicable law, which were at least as beneficial to petitioner as the circumstances warranted.

#### ARGUMENT

#### I

#### **The Testimony of the Government Agent Relating to Conversations He Overheard Between Petitioner and Chin Poy Was Not Subject to Exclusion as the Fruit of an Unreasonable Search and Seizure Proscribed by the Fourth Amendment**

Petitioner urges that the testimony of Agent Lee as to conversations he overheard between petitioner and Chin Poy should have been excluded under the rule of *Weeks v. United States*, 232 U.S. 383, as the fruit of an illegal search and seizure (Br. 17-36). He does not contend that the witness Lee ever entered petitioner's laundry or performed any act which could be considered a search or seizure. His contention is predicated on the fact that when Chin Poy entered the public room of petitioner's laundry, he had a radio transmitter concealed on his person, so that his conversation with petitioner was overheard by Agent Lee from his position four doors down the street. We submit, however, that there is in this case no foundation for the invocation of the *Weeks* rule.

There was here no search or seizure, and no trespass which would preclude the use of that which was heard.<sup>9</sup>

*A. The use of an amplification device to overhear conversations is not a search and seizure*

The decision of this Court in *Olmstead v. United States*, 277 U.S. 438, refusing to exclude evidence obtained by wire-tapping, established the proposition that the overhearing by a mechanical contrivance of a private conversation is *not per se*

<sup>9</sup> Petitioner made no contention either before or at any time during the trial that there had been an illegal search and seizure. Defense counsel objected to the testimony in question solely on the ground that it related to another transaction not bearing on the crime charged (R. 104-108). On motion of defense counsel, the court instructed the jury to disregard any evidence relating to any transaction not included in the crime charged, and instructed that the conspiracy is presumed ended by arrest. (R. 109.) Later the court again told the jury that petitioner was not being tried for any offense committed after January 22 (R. 114). It did rule that an admission relating to the crime committed on January 22, 1950, could be allowed in evidence regardless of when it was made (R. 114). Defense counsel agreed with this ruling, but contended that the defense was prejudiced by other parts of the same conversation, revealing a later transaction not included in the indictment (R. 114-115). Although motions were made by the defense on conclusion of the Government's case, no mention was made of an illegal search or seizure (R. 244-258). Petitioner took the stand and admitted talking with Chin Poy for over an hour (R. 292-294), but denied any discussion regarding opium (R. 294-295). When petitioner was questioned on cross-examination by government counsel, defense counsel again objected to questions relating to the March 30 conversation on the ground that they sought to elicit evidence tending to prove the commission of another crime (R. 295-296). Although defense counsel made additional motions after closing testimony, no mention was made of evidence illegally obtained (R. 317-330). The usual rule is that where a question of the legality of the

violative of the rights secured under the Fourth Amendment where otherwise there is no searching of an individual's house, his person, his papers, or his effects. That ruling, consistently followed by this Court (*Goldstein v. United States*, 316 U.S. 114, 120; *Goldman v. United States*, 316 U.S. 129, 135; see also *United States v. Dennis*, 183 F. 2d 201, 225 (C.A. 2), affirmed, 341 U.S. 494), applies here. Here, as in *Olmstead*, "we have testimony only of voluntary conversations secretly overheard." 277 U.S. at 464. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." *Ibid*.

In *Goldman v. United States*, *supra*, as here, officers of the law employed a mechanical device to make a conversation audible beyond the confines of the place in which it was conducted. There, government agents overheard conversations of the

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procurement of tangible evidence is not raised before, or at least during, the trial, it is waived. *Seguro v. United States*, 275 U.S. 106, 111-112; *Landsborough v. United States*, 168 F. 2d 486 (C.A. 6), certiorari denied, 335 U.S. 826; *Cromer v. United States*, 142 F. 2d 697 (C.A. D.C.), certiorari denied, 322 U.S. 760. The trial court should at least have an opportunity to dispose of such a contention on its merits at some time during the proceedings. *United States v. Di Re*, 332 U.S. 581, 582. If petitioner's premise is assumed *arguendo*, that the Fourth Amendment protection extends to oral utterances, it follows that similar timely objection to testimony reporting such utterances should be required. At least it would seem that such an objection comes too late when, as in this case, it is not raised until oral argument on the appeal. For if there was anything in this case which might have been deemed a "search and seizure," its reasonableness was "in the first instance for the District Court to determine." *United States v. Rabinowitz*, 339 U.S. 56, 63.

defendants by means of a detectaphone affixed to the wall adjoining defendants' private office. In an effort to distinguish the *Olmstead* decision, the defendants argued to this Court that the employment of the detectaphone violated the Fourth Amendment because where "one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room," 316 U.S. at 135. Rejecting this distinction and refusing to overrule *Olmstead*, this Court held that there had been no violation of the Fourth Amendment. In the present case, we submit, the effort to distinguish a detectaphone from a radio transmitter, both employed to make audible to outsiders speech presumably intended "to be confined within the four walls of the room," is "too nice for practical application of the Constitutional guarantee \* \* \*." *Ibid.*

There was thus no search or seizure by use of the radio transmitter to overhear conversations either on the street or in the laundry. The word "search" connotes uncovering that which is hidden, prying into hidden places for that which is concealed. It is not a search to observe what is open to view. The Fourth Amendment does not forbid use of knowledge gleaned by the sense of hearing or sight. *McDonald v. United States*, 166

F. 2d 957, 958 (C.A. D.C.).<sup>10</sup> The rule has long been established that the eye cannot be guilty of a trespass. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066. This Court has held that the projection of a light onto private property, a ship, does not constitute a search where there is no exploration below decks or under hatches. *United States v. Lee*, 274 U.S. 559, 563. The same principle has been applied to the projection of light into a building, which has likewise been held not to constitute a search in the constitutional sense. *Safarik v. United States*, 62 F. 2d 892, 895 (C.A. 8); *Smith v. United States*, 2 F. 2d 715, 716 (C.A. 4). And the *Goldman* holding extended the principle to auditory impressions.

Clearly there was no seizure and no entry for the purposes of seizure. Where a defendant's own acts disclose incriminating evidence to law-enforcement officers there is no seizure, *Hester v. United States*, 265 U.S. 57, 58, even if words and impressions could be the object of seizure. And this Court in *Olmstead v. United States*, *supra*, said (277 U.S. at 466):

Neither the cases we have cited nor any of the many federal decisions brought to our at-

<sup>10</sup> This part of the lower court's holding in the *McDonald* case was accepted *arguendo* by this Court in reversing the judgment of the court of appeals on the ground that a right of privacy secured to McDonald was abrogated by the forceful entry into his boarding house, followed by seizure without warrant of his property. *McDonald v. United States*, 335 U.S. 451, 454. And see *id.* at 458 (concurring opinion of Mr. Justice Jackson, in which Mr. Justice Frankfurter concurred).

tention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

No justification exists for enlargement of the words "search and seizure" so "as to forbid hearing or sight." *Id.* at 465.

Had Chiu Poy in the instant case concealed a camera on his person and snapped pictures of petitioner it could hardly be maintained that such pictures would be inadmissible. They would be as legitimate as his testimony telling what he saw. The concealment of a radio transmitter is no different in principle. In the first case a visual impression is carried off the premises; in the second case an auditory impression. Neither is the result of a "search."

Petitioner's contention that *Nueslein v. District of Columbia*, 115 F. 2d 690 (C.A. D.C.) extends the protection of the Fourth Amendment to vocal utterances of an accused as such is unfounded. In that case officers investigating a motor accident went to Nueslein's home and made an illegal entry without a warrant. Later, after the officers had "searched" for and found him on the second floor, Nueslein confessed to facts which incriminated him, and he was then placed under arrest. The Court of Appeals for the District of Columbia held

the confession inadmissible as being the fruit of an illegal search. The gist of the holding was that an illegal search was conducted by the officers' entry of a private dwelling without a warrant; the court did not hold that the search consisted of listening to the accused as he confessed to the crime. It was the search of his home within the interdiction of the Fourth Amendment which tainted his confession with illegality. The *Nueslein* case holds merely that, if the opportunity to overhear is the result of a trespass, the words overheard are inadmissible as the fruits of illegality. (Cf. *Goldman v. United States*, 316 U.S. 129, 134-135, where it was suggested that, if the detectaphone had been installed by means of a trespass the conversations overheard would not have been admissible. But cf. *Olmstead*, *supra*, at 465, and cases there cited, indicating that a trespass where there follows "no search of person, house, papers or effects" is in itself no ground for excluding evidence gleaned through sight or hearing.) The *Nueslein* case is not inconsistent with the principle established by the *Olmstead* and *Goldman* decisions that the overhearing of a conversation with or without the aid of a mechanical device is not a search and seizure within the meaning of the Fourth Amendment.

B. *There was no unlawful entry or trespass*

The foundation of the dissenting opinion below, upon which petitioner relies, is that the Govern-

ment committed a trespass into petitioner's "home" by sending Chin Poy into petitioner's laundry with a radio transmitter attached to his person. In this view, the testimony as to the overheard conversation between Chin Poy and petitioner which took place on the street was admissible, but testimony as to the overheard conversation which took place in the public room of the laundry was not. We submit that there is no basis for this distinction. Chin Poy's entry into the laundry with a radio transmitter concealed on his person was no more a trespass than Chin Poy's conversation with petitioner on the street.<sup>11</sup>

Chin Poy did not gain entrance into the public room of the laundry by force, by stealth or by virtue of any deceptive statements concerning the object of his visit. Entry was not effected under

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<sup>11</sup> Petitioner, arguing that the conversation between himself and Chin Poy on the street overheard by radio is unworthy of consideration here (Br. 34-35), contends that this conversation did not refer to the transaction of January 22, 1950, for which he was convicted, and that "no verdict of the jury could be claimed to be predicated upon" the testimony relating his admission on the street that he was an agent for a syndicate. If this suggestion were correct, there would be no basis at all for petitioner's present search-and-seizure argument since precisely the same admission—that petitioner was an agent for a syndicate—was overheard during his conversation in the laundry with Chin Poy, and it is testimony as to this admission which petitioner now attacks. In any event, our argument here is not concerned with the weight or the relevance (which petitioner has not urged for consideration by this Court) of the reported admission. What we seek to show is that, for purposes of the constitutional issue this case presents, the admittedly permissible testimony as to the conversation on the street differs in no essential respect from the testimony as to the conversation in the laundry.

color of office (cf. *Johnson v. United States*, 333 U.S. 10, 13), or by implied coercion (cf. *Amos v. United States*, 255 U.S. 313), or by stealth (cf. *Gouled v. United States*, 255 U.S. 298, 305-306), or by false representation of purpose (cf. *Fraternal Order of Eagles v. United States*, 57 F. 2d 93 (C.A. 3)). While Chin Poy concealed from petitioner the true reason for his visit, a passive non-disclosure of purpose does not render an otherwise legal entry illegal, *Warren v. Territory of Hawaii*, 119 F. 2d 936, 937 (C.A. 9). In short, there is absent in the instant facts any element of forceful entry, either actual or constructive. Cf. *Baxter v. United States*, 188 F. 2d 119, 120 (C.A. 6); *Love v. United States*, 170 F. 2d 32, 33 (C.A. 4), certiorari denied, 336 U.S. 912.

Chin Poy merely entered the open door of a public shop just as any other member of the public could legally do under the license implicit in the maintenance of such a public establishment. These premises, open to the general public, which were in fact visited by laundry customers who came and went during the conversation testified to, were not comparable to a private home (cf. *Nueslein v. District of Columbia*, 115 F. 2d 690 (C.A. D.C.)) or a private office (cf. *Goldman v. United States*, 316 U.S. 129). See *United States v. Rabinowitz*, 339 U.S. 56, 64; *Davis v. United States*, 328 U.S. 582, 593. Where premises are open to the general public, law-enforcement officers may legally enter without warrant, and if

they see incriminating evidence without ransacking the premises or otherwise conducting a "search," there is no prohibition against their testimony as to what they saw. *Smith v. United States*, 105 F. 2d 778 (C.A. D.C.); *Boyer v. United States*, 92 F. 2d 857 (C.A. 5); *Lawson v. United States*, 9 F. 2d 746, 747 (C.A. 7); *McWalters v. United States*, 6 F. 2d 224 (C.A. 9); *Ludwig v. United States*, 3 F. 2d 231, 232 (C.A. 7). An entry pursuant to invitation does not constitute a trespass so as to bring testimony derived thereby within the scope of the exclusionary rule. *Stein v. United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844; *Blanchard v. United States*, 40 F. 2d 904 (C.A. 5).

The dissenting opinion below concedes that the entry of Chin Poy into the premises was agreed to by petitioner (Pet. 62), but asserts that the concealment of the radio transmitter on Chin Poy's person constructively brought Agent Lee into the room, although physically he was four doors down the street. This precise contention was raised and rejected in the *Olmstead* case, petitioners there arguing (see 277 U.S. at 444):

The effect of this trespass was to project themselves into the houses and offices of the defendants, with the same result as if they had broken through the windows or doors and secretly seized letters containing the identical messages that were transmitted over the phones.

Thus *Olmstead* destroys the foundation of the dissenting opinion below—that the use of the radio transmitter amounted to a trespass by the agent. And the substantial identity in operation and purpose between a detectaphone and a radio transmitter renders artificial the effort to distinguish the present case from this Court's *Goldman* decision.

In support of its trespass argument, the dissent below suggests (Pet. 61, 62) that the situation here should be viewed as if an agent had sneaked into On Lee's laundry and hidden in a closet or "as if the agent had been a midget and had been hidden in a bag carried by Chin Poy on to On Lee's premises." Without considering the result which might be required in such hypothetical situations, it seems sufficient to note that they would have been neither more nor less pertinent to the *Olmstead* and *Goldman* cases than they are here. For the fact is that the supposed cases involved in Judge Frank's dissent resemble this one—and *Olmstead* and *Goldman*—only in the sense that they suggest other methods of accomplishing the same result, of overhearing statements which are not intended to be overheard. And this Court's decisions show that legal means of obtaining evidence are not to be condemned because the same objective might have been achieved illegally. Looking through a window or throwing a searchlight on a boat may sometimes achieve the same result as an entry into a

building or a search of the boat. The use of deteaphones in the *Goldman* case accomplished the same result as the agents might have accomplished had they been able to hide behind some desks. But the legal effect is not the same. The question is, not what has been learned, but the means by which the information has been obtained. In the one case the element of trespass by government agents is manifestly present. In the other, although permissible artifice is employed, the trespassory element is absent.

Here there was no trespass by Chin Poy's entry. Had Chin Poy entered the laundry and conversed with petitioner without carrying a radio transmitter on his person, his activities would in no respect have constituted a trespass even though he concealed the fact that he was a government informer. Certainly Chin Poy could have testified as to what he himself heard, although he would have obtained the admissions by concealing his identity as a government agent. If Chin Poy could have succeeded in getting petitioner to talk loudly enough so as to be overheard by Agent Lee standing on the street or posing as a laundry customer inside the shop, the latter's testimony would not be subject to attack. The radio transmitter was a mechanical means of accomplishing that end. All that petitioner complains of here comes down to the fact that a man whom he considered a friend was a government informer. That, however, was

not a violation of petitioner's constitutional rights.<sup>12</sup>

It may be true that, lacking some such auditing device as was employed here and in *Goldman* and *Olmstead*, the Government's agents might have been unable to hear what they heard without committing a trespass. The important fact remains that there was no trespass in any of these cases and that the employment of artifice to apprehend those engaged in criminal enterprises is subject to no valid legal objection. *Sorrells v. United States*, 287 U.S. 435, 441. The use of decoys and other forms of deception is subject to no prohibition so long as there is no infringement of constitutional rights of the defendants, cf. *Grimm v. United States*, 156 U.S. 604, 610; *United States v. Dennis*, 183 F. 2d 201, 224-225; *United States v. Abdallah*, 149 F. 2d 219 (C.A. 2), certiorari denied, 326 U.S. 724; *United States v. Lindenfeld*, 142 F. 2d 829 (C.A. 2), certiorari denied, 323 U.S. 761. This Court in the *Olmstead* case, addressing itself to the contention that it should exercise its

<sup>12</sup> This case is clearly distinguishable from *Gouled v. United States*, 255 U.S. 298, on which petitioner relies. In that case an entry by fraud was used to accomplish a violation of constitutional rights by a search without a warrant. Chin Poy did not enter surreptitiously as in *Gouled*; he merely failed to disclose the motive of his legal entry. In the *Gouled* case there was both a search and a seizure. In the instant case there was neither. *Gouled* clearly did not pronounce a rule that law-enforcement officers must recite their connection with crime detection before their testimony of criminatory admissions voluntarily made to them by an accused can be valid.

discretion to exclude evidence because it was "unethically secured", said (277 U.S. at 468):

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. *The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.*

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the

Constitution would be violated by admitting it. [Emphasis added.]<sup>13</sup>

In short, the use of scientific devices to apprehend criminals—who are themselves able to take advantage of the many resources of modern technology—is in itself lawful and necessary as long as constitutional limitations are observed. The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publicize conversations within a private home are unrelated to the instant case. As has been observed above, a private home is not here involved; the conversations transpired in a place to which the public was invited. In any event, if science should in the future perfect instruments which seriously invade truly private conversations, the validity of such developments may be considered as they appear. The present inquiry cannot be expanded beyond the relevant question as to whether, under the facts of the instant case, petitioner's constitutional rights have been abrogated in this instance.

This Court's *Olmstead* and *Goldman* decisions make it clear that the use of the transmitter in this case did not require rejection of the testimony

<sup>13</sup> This language, it seems to us, answers petitioner's argument (Br. 39-42) that this Court, in the exercise of its supervisory authority to formulate rules of evidence to be applied in federal criminal prosecutions (*McNabb v. United States*, 318 U.S. 332), should exclude the evidence in question because of the deception employed in obtaining it. Clearly there was no compulsion against petitioner. Nor were there present any other elements—e.g., threats or

proving petitioner's admissions. For Chin Poy's lawful entry into petitioner's laundry was no trespass and the overhearing of petitioner's statements was in no sense an unlawful search and seizure. There is no basis for invoking the rule of exclusion for there was no violation of any of petitioner's constitutional rights.

## II.

### **The Overhearing by Means of a Mechanical Listening Device of an Untransmitted Face-to-Face Conversation Does Not Constitute an "Interception" of a Radio or Wire Communication within the Meaning of the Federal Communications Act**

Petitioner urges that the overhearing of the face-to-face conversation between himself and Chin Poy constituted an interception of a radio or wire communication within the meaning of Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C. 605 (*supra*, pp. 3-4).<sup>14</sup> As the court below held, however, the simple fact of this case is that (Pet. 45-46) "there was no 'interception' of a communication by wire or radio which is what the statute forbids. The radio device was merely a mechanical means of eavesdropping, just as the detectaphone was in the

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promises—touching the complete voluntariness of his statements to Chin Poy. The *McNabb* principle he invokes does not avail him. The rule of that case was premised upon the policy of legislation requiring the prompt arraignment of arrested persons and was designed to implement that policy. No such premise for petitioner's contention is present in this case.

<sup>14</sup> Like the contention based on the Fourth Amendment, this argument was raised for the first time on appeal.

*Goldman* case." Petitioner was in no remotely relevant sense a "sender" of a communication by wire or radio. He neither sent nor intended to send any message through one of the protected channels of communication. His only "communication" was made in direct conversation; the only "interception" was of this communication. The fact that this interception was accomplished by means of a radio device does not make of the conversation a communication by radio within the meaning of the Communications Act.

The futility of petitioner's reliance on that Act is amply demonstrated by this Court's *Goldman* decision. There, by means of a mechanical contrivance, a voice in the next office speaking into a telephone receiver was heard by government officers. Since the speaker in that case, whose voice was overheard, was using a protected means of transmission, there was—as there is not here—at least some superficially plausible basis for invoking the Communications Act. So the petitioners there contended that a communication falls within the protection of the statute once a speaker has uttered words with the intent that they constitute a transmitted telephone conversation. In rejecting this contention this Court said (316 U. S. at 133-134):

The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute, but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. The same view of the scope of the Communications Act follows from the natural meaning of the term "intercept." As has rightly been held, this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver. The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room.

"Interception" is limited to taking or seizing by the way or before arrival at the destined place—some interjection between the termini of communication. *Goldman v. United States, supra*; *United States v. Lewis*, 87 F. Supp. 970, 974 (D. D. C.), reversed on other grounds, 184 F. 2d 394 (C. A. D. C.). It is not the message itself which the Act renders inviolable, but rather a protected channel of communication. Certainly petitioner, holding a face-to-face conversation with Chin Poy, was engaged in no communication of the kind safeguarded against interception.

No intent to protect private, untransmitted conversations can possibly be read into the clear language of Section 605. And even if the plainly expressed purpose of that language were at all ambiguous other sections of the Act remove any possibility of doubt. In Section 1 the overriding purpose of the Act of "regulating interstate and foreign commerce in communication by wire and radio" is pronounced. In Section 2(a) the Act is made to "apply to all interstate and foreign communication by wire or radio." In Section 3(a) and (b), "wire communication" and "radio communication" are defined. There is no support anywhere in the Act for the contention that Section 605 was framed to protect untransmitted conversations from eavesdropping devices, including radio transmitters. The history of the Communications Act of 1934 shows that its purpose was to extend to wire communications the prohibi-

tion against unauthorized publication of communications by radio.<sup>13</sup> There is no intimation of any intention to protect oral "communications" generally.

Petitioner seems to suggest (Br. 38-39) that the fact that the auditing device was itself a radio brings him within the purview of the Act. But the language of Section 605 cannot be interpreted to prohibit the use of such auditing devices. Employed as it was, this radio transmitter was no more a protected channel of communication than a detectaphone or a sensitive hearing aid would be. It was obviously not used for the transmission of radio communications within the meaning of the Act.

### III

#### **No Prejudicial Error Resulted from Admission of Testimony of Petitioner's Silence When His Co-Defendant Ying Made Accusatory Statements in His Presence After Arrest in View of the Court's Charge to the Jury**

Petitioner also alleges as error (Br. 42 *et seq.*) the reception of testimony relating to his silence in the face of accusatory statements made in his presence by co-defendant Ying after the arrest. The facts, briefly, are these:

At the trial, Detective Monahan testified that, immediately after the apprehension of Ying and

<sup>13</sup> See Report No. 781, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., p. 11; Report No. 1850, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., p. 9. See also *Weiss v. United States*, 308 U.S. 321, 328.

petitioner, they were kept apart and questioned. At that time petitioner denied knowing Ying (R. 73). Thereafter, Monahan testified, the two men were "booked" and taken to the Bureau of Narcotics, where they were put together in one room. At this point of the examination, defense counsel objected to any testimony as to what Ying had said after arrest as not binding on petitioner. The court, however, allowed Monahan to testify that, while petitioner at first denied delivering opium to Ying or having anything to do with him (R. 74), later, when Ying admitted receiving the opium from petitioner, petitioner remained silent and said nothing (R. 75). There was extended argument thereafter of the question whether testimony as to silence in the face of an accusatory statement is admissible (R. 75-80). The court reserved decision, and allowed cross-examination to proceed (R. 80). On cross-examination, Detective Monahan testified that petitioner "always denied" having any transaction with any opium (R. 90). Agent Lee also testified that petitioner denied that the opium was his (R. 103). When Ying was questioned by Government counsel as to what the detective had asked him, defense counsel objected (R. 219). Again there was argument as to whether silence in the face of an accusatory statement can constitute an admission (R. 219-222). The court allowed counsel to submit briefs on this point of law (R. 222) and it was not pursued further. After the Government had rested its case, defense counsel again

raised his objection to admission of the remarks of Ying after the arrest, and, following extensive argument (R. 244-255), the motion was denied (R. 255). However, in his instructions to the jury, the trial court told them that admissions and statements of a conspirator after the conspiracy has terminated do not bind a co-conspirator (R. 349); that after the arrest of the conspirators the conspiracy is terminated and no admission or statement made by a conspirator after the arrest binds a co-conspirator (R. 349-350); that the act or statement to bind a co-conspirator must be made by a conspirator while the conspiracy is in effect, in furtherance of the object of the conspiracy, and before its termination (R. 350). Later, the court instructed the jury (R. 360): "No admission made by Gong after the arrest can bind On Lee. I have already so charged, I think, fully." Then the court instructed the jury as follows (R. 360-362):

I will charge the jury that if before the arrest the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest in the presence of Monahan and possibly some of the other agents he was told or heard Gong saying, "you gave it to me; you delivered it to me," then under those circumstances the defendant On Lee could remain silent, and his silence would

not be regarded as tacit admission that he did so.

The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing, and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.

Now I modify that by this consideration: if before the arrest he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him "I got it from you; you delivered it to me," in that case I would say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient.

The district judge correctly stated the general rule that testimony as to the silence of a defendant when confronted with accusations is admissible if made under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth. This Court so held in *Sparf and Hansen*.

v. *United States*, 156 U. S. 51, 56, and that decision has been followed consistently by the lower courts. *Egan v. United States*, 137 F. 2d 369, 380-381 (C. A. 8); *Seeman v. United States*, 90 F. 2d 88, 90 (C. A. 5); *Rocchia v. United States*, 78 F. 2d 966, 972 (C. A. 9); *Dickerson v. United States*, 65 F. 2d 824, 826-827 (C. A. D. C.); *Graham v. United States*, 15 F. 2d 740, 742-743 (C. A. 8). Wigmore states the rule as follows (4 Wigmore, *Evidence* (3d ed., 1940), Section 1071, p. 74):

\* \* \* \* It would seem to be better to rule at least that any statement made in the party's presence and hearing is receivable, *unless* he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety. But the burden is in practice generally left upon the proponent to show that the requisite conditions existed; though the middle course is sometimes taken of leaving the question to the jury [footnotes to supporting decisions omitted].

The applicability or nonapplicability of the rule is conditioned on whether the circumstances are such that one would in the natural course of human behavior contradict accusatory statements made in his presence implicating him in a crime. Acquiescence in the truth of a statement clearly may be proved by a course of action as well as by words of agreement. And silence is as probative

under certain conditions as verbal admissions would be. Of course, circumstances may exist to negative any inference which might otherwise be raised by the silence of an accused in the face of accusations of his accomplice. For example, as the court instructed the jury in this case, if an accused has once denied his implication in the crime, no presumption arises by reason of his failure to rebut further accusations of his accomplice. Many other factors may likewise forbid the inference. See 4 Wigmore, *Evidence* (3d ed., 1940), Section 1072.

This Court has held admissible evidence that an accused defendant remained silent when confronted with an accusatory statement even where the defendant was under arrest at the time such statement was made. *Sparf and Hansen v. United States*, 156 U. S. 51, 56. The same view has been announced in lower court decisions, (*Dickerson v. United States*, 65 F. 2d 824, 826, 827 (C. A. D. C.); *Rocchia v. United States*, 78 F. 2d 966, 972 (C. A. 9)), as well as by Wigmore, whose treatise states (4 Wigmore, *Evidence* (3d ed., 1940), Section 1072, pp. 80-81):

Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party is at the time *under arrest* creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early

Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule is to allow some flexibility according to circumstances [footnote to supporting decisions omitted].

On the other hand, as petitioner points out (Br. 47), other courts, including the court below, have held that where an accused is under arrest, his failure to deny an accusatory statement may not be used as a basis for inferring his guilt. At the very least, this state of the authorities makes wholly understandable and proper the delay of the trial judge in this case in ruling finally on the admissibility of the testimony in question. And even assuming, as the court below did, that the initial admission of such testimony was erroneous, the district judge's charge to the jury left no basis for the present contention that petitioner was prejudiced. For the charge effectively removed this testimony from the jury's consideration.

In substance the district judge charged that if petitioner had once denied his guilt, no inference against him was to be drawn from his failure to repeat the denial when confronted with the accusatory statement of his accomplice. It is true, as the dissent below points out (Pet. 68-69), that in referring to the denial which would make subsequent denials unnecessary, the trial judge described it as one made "before the arrest." It is clear, however, both from the undisputed evidence before the jury

and from the remainder of the trial judge's comprehensive charge on this issue, that the jury could not have been misled into supposing that this phrase referred to some time before the apprehension of petitioner and his accomplice by the officers. In his charge the trial judge explicitly referred to denials addressed to the officers; and it was clear from the evidence that there had been no contact between petitioner and the officers until after his apprehension on the street.

The record shows that petitioner was questioned on two separate and distinct occasions—once before and once after his booking at a local police station. Prior to the booking, when he was questioned alone, he denied any implication in the crime. After the booking, when he was questioned in the presence of his accomplice, he repeated the denial (R. 74). It was at this point, immediately following petitioner's second denial of guilt, that he remained silent when his accomplice's accusatory statement was made.

In these circumstances, there is scarcely room to doubt that the jury understood petitioner's denial prior to his booking to have rendered unnecessary any further denial when his accomplice later in his presence implicated him. We think the necessary conclusion of both judge and jury was stated at the conclusion of the charge (R. 361-362): "There was a denial there and he didn't have to tell the people to whom he already denied it that it was not so if the statement was made in

his presence. He has denied it once and that would be sufficient."

The court below was clearly correct in concluding that neither the colloquies between counsel and the trial court nor the initial admission of his co-defendant's accusatory statements prejudiced petitioner. As to legal arguments during the trial, the courts have necessarily and properly recognized that such discussions of the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. *Fredrick v. United States*, 163 F. 2d 536, 548 (C. A. 9), certiorari denied, 332 U. S. 775; *Goldstein v. United States*, 63 F. 2d 609, 613 (C. A. 8): The question involved clearly warranted the court in reserving its decision, and any possibility of prejudice was erased by the instructions.

#### CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,  
*Solicitor General.*

JAMES M. MCINERNEY,  
*Assistant Attorney General.*

ROBERT S. ERDAHL,  
CARL H. IMLAY,

*Attorneys.*

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**Supreme Court of the United States**

October Term, 1951

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ON LEE,

Petitioner,

v.

UNITED STATES OF AMERICA.

**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE**

Now come Joseph Steinberg and Donald Steinberg, by their attorney, Sanford H. Cohen, and respectfully move for leave to file a brief as *amici curiae* in the above entitled cause.

Gilbert S. Rosenthal, Esq., the attorney for the petitioner On Lee, has consented to permit the filing of a brief as *amici curiae* on behalf of Joseph Steinberg and Donald Steinberg, and expressly consents to the granting of this application. The Solicitor General has withheld consent, stating that it is his practice to do so in order to enable this Court to determine for itself the propriety of each application.

The basis of this application arises out of the fact that Joseph Steinberg and Donald Steinberg are defendants in separate criminal prosecutions for perjury alleged to have been committed in testimony before a Grand Jury. Their respective trials are now pending in the United States District Court for the Southern District of New York.

The United States Attorney, acting in pursuance of a subpoena issued under Rule 17(c) of the Federal Rules of Civil Practice and under an order issued out of the District Court, has stated that the necessary corroboration under one count against each of the defendants will be testimony of a Government Agent who will claim to have overheard a conversation conducted in the defendants' private office by means of a transmitting device concealed on the person of a visitor to that office.

The Steinbergs are attorneys, and the visitor who consulted the Steinbergs in their private office, with a transmitting device concealed on his person, was the client whose testimony will be sought to be corroborated by means of the transmitting device.

Accordingly, there are two separate bases for the instant application:

1. Because the question of law which will be presented on the trials against the Steinbergs is so identical with the question which may be determined by this Court in the *On Lee* case that, the decision in the *On Lee* case may be dispositive of the question which may arise on the separate trials against the Steinbergs. On March 24th, 1952, the District Court granted a continuance of the trials against the Steinbergs on the application of their counsel upon the ground of the identity of the question in the *On Lee* case with that which might be expected to be presented on the two trials against the Steinbergs.

2. Because the situation of the use of a concealed transmitting device, worn on the person of a client upon consultation with his attorneys in their private office, presents aspects of a special kind which are pertinent to the general policy which may be adopted in the *On Lee* case, but which may be overlooked unless called to the attention of this Court directly and specifically. It is to be expected that this Court, upon formulating a general

rule with the facts of the *On Lee* case directly before it, will attempt to envisage many different kinds of situation to which the principle to be announced will be applicable. It is not impossible, however, that the special situation presented by the consultation of attorney and client in the attorney's private office may not receive the full consideration which it deserves unless directly presented in a brief.

WHEREFORE, Sanford H. Cohen respectfully requests leave to file a brief as *amici curiae*.

SANFORD H. COHEN,  
Attorney for Joseph Steinberg  
and Donald Steinberg,  
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New York 17, N. Y.

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IN THE

**Supreme Court of the United States**

October Term, 1951

No. 543

ON LEE,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit

**PETITION FOR REHEARING**

GILBERT S. ROSENTHAL,  
*Counsel for Petitioner.*

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## PETITION FOR REHEARING

Now comes the petitioner, On Lee, and respectfully prays that this Honorable Court grant rehearing of its Order of June 2nd, 1952 affirming the judgment of conviction of the petitioner herein.

The petitioner respectfully submits that the Court's Opinion delivered by Mr. Justice Jackson discloses that the majority of the Court in considering and deciding the writ of certiorari in the within case failed to consider or was mistaken in considering the following:

At page 2 of the Opinion of the Court there is mention of the fact that damaging admissions were "audited" by

Agent Lee during a conversation held upon the sidewalk between Chin Poy and petitioner. At page 185 of the record it definitely appears that Agent Lee referred only to the conversation of March 30th, 1950, which was not a street conversation but was one held at petitioner's combined home and place of business.

At page 4 of the Opinion of the Court reference is made to *Goldman v. United States*, 316 U. S. 129 and it is stated that this Court ruled on the action of federal agents placing a detectaphone on the outer wall of defendant's *hotel room*. Such is not the case. The detectaphone and dictaphone discussed in the *Goldman* case, were used in respect to the defendant's *place of business*, the office of the defendant, a lawyer. It is respectfully submitted that no distinction should be made between places of business, whether it be a law office or a laundry; for presumably an attorney maintaining an office welcomes the general public to come to his office to consult him on business and the prospective retaining of him as a lawyer just as a laundryman welcomes a prospective laundry customer. Too, a lawyer may, and frequently does, reject the proffered case or retainer and a laundryman may, and often does, reject proffered business.

Nowheres in the Opinion of the Court does it appear that this Honorable Court considered the fact that the only "evidence" offered at the trial concerning the visits of Chin Poy to petitioner's place in Hoboken and the circumstances under which he was received was the testimony of the petitioner. Quotations of this testimony appear at pages 20 and 21 of the original Brief for Petitioner used upon the argument of this case and containing quotes from pages 295 and 298 of the record.

A quotation also appears at page 20 of the aforementioned Brief of the comment of the Trial Court as to the circumstances of Chin Poy's visits to petitioner, and this quotation was taken from page 296 of the record.

It is respectfully submitted that the reading of these portions of the record completely nullifies the statement contained within the Opinion of the Court that "Chin Poy entered a place of business with the consent, if not the implied invitation, of the petitioner."

At page 8 of the Court's Opinion, the learned Justice, delivering same, *speculates* "on the reasons why Chin Poy was not called" and proceeded to express the thought that the testimony of Agent Lee undoubtedly would be found by the jury to have more probative value than the word of Chin Poy. The inherent viciousness of the practice indulged in by the Government in this case in attempting to substitute the testimony of a Government agent in place of the person actually used to confront the petitioner becomes apparent when it is learned that shortly after the trial of the within case federal narcotic Agent Lee was either forced to or permitted to resign from the service of the Treasury Department for acts committed by him which were considered and found to be improper and inimical to the best interest of the Treasury Department. Or, to borrow the phrase so frequently used, he left the service "for the good of the service." Since then the United States Attorney for the Southern District has dismissed all indictments, proof of which depended upon Agent Lee's testimony.

Thus it appears that what the Court's Opinion calls an argument resting solely on the proposition that the Government should be arbitrarily penalized for the low morals of its informers and what Justice Frankfurter's dissenting

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opinion states makes for lazy and not alert law enforcement and places a premium on force and fraud reaches its full fruit and fulfills the prophecies contained within both opinions.

Surely no member of this Honorable Court is so naive as to believe that law enforcement agents who are constantly in the news and public prints of today and of the past for having taken bribes and money to overlook and ignore the indiscretions and crimes of members of our society would not also be so low as to "frame" and falsely accuse a victim who has fallen into their toils.

The "cashiering" of federal narcotic Agent Lee subsequent to petitioner's trial definitely establishes the wisdom of protecting a defendant from this type of testimony, and the acts of the Government should not be sanctioned with the old saw that "the end justifies the means."

### Conclusion

It is respectfully submitted that the within application for rehearing should be granted.

Respectfully submitted,

GILBERT S. ROSENTHAL,  
*Counsel for Petitioner.*

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

GILBERT S. ROSENTHAL,  
*Counsel for Petitioner.*